Judgments of the Administrative Tribunal of the International Labour Organization:

77th Session

(May-July 1994)

International Labour Office

Geneva

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The Administrative Tribunal of the International Labour Organisation (ILO) is competent to hear complaints against:

International Labour Organisation, including the International Training Centre

World Health Organization (WHO), including the Pan American Health Organization (PAHO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

International Telecommunication Union (ITU)

World Meteorological Organization (WMO)

Food and Agriculture Organization of the United Nations (FAO)

European Organization for Nuclear Research (CERN)

General Agreement on Tariffs and Trade (GATT)

International Atomic Energy Agency (IAEA)

World Intellectual Property Organization (WIPO)

European Organisation for the Safety of Air Navigation (Eurocontrol)

Universal Postal Union (UPU)

European Patent Organisation (EPO)

European Southern Observatory (ESO)

Intergovernmental Council of Copper-Exporting Countries (CIPEC)

European Free Trade Association (EFTA)

Inter-Parliamentary Union (IPU)

European Molecular Biology Laboratory (EMBL)

World Tourism Organization (WTO)

African Training and Research Centre in Administration for Development (CAFRAD)

Intergovernmental Organisation for International Carriage by Rail (OTIF)

International Center for the Registration of Serials (CIEPS)

International Office of Epizootics (OIE)

United Nations Industrial Development Organization (UNIDO)

International Criminal Police Organization (Interpol)

International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)

Customs Co-operation Council (CCC)

Court of Justice of the European Free Trade Association (EFTA Court)

Surveillance Authority of the European Free Trade Association (ESA)

This volume contains the judgments the Tribunal delivered at its 77th Session (May-July 1994). The judgments it delivered at its first 39 sessions (Nos. 1 to 330) were published in the Official Bulletin of the International Labour Office. The judgments it delivered at its 40th to 76th Sessions have appeared in thirty-one bound volumes, which may be ordered from the Publications Branch, International Labour Office, CH 1211 Geneva 22.

Corrigendum

The volume entitled "Judgments of the Administrative Tribunal of the International Labour Organization: 77th Session (May-July 1994)" mistakenly includes the French text of Judgment 1337.

The English text is appended.

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re MOLLA Judgment 1337

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tawye Molla Sharew against the Food and Agriculture Organization of the United Nations (FAO) on 13 June 1993 and corrected on 20 August and the Organization's reply of 5 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The World Food Programme (WFP) was set up under resolutions that the Conference of the FAO and the General Assembly of the United Nations adopted in 1961. It is an affiliate of the FAO and has its headquarters in Rome. It runs a Transport Operation in Ethiopia, known as the WTOE, under agreements it has concluded with the Government of that country. The WTOE is in charge of the distribution of emergency supplies to distressed areas of the country and has several hundred lorries, tractors and trailers at its disposal for the purpose. The competent Government agency is the Relief and Rehabilitation Commission, known as the RRC. Both the WTOE and the RRC have headquarters in Addis Ababa.

The complainant is an Ethiopian citizen who was born in 1955. He concluded a "special service agreement" with the WTOE in July 1987 to serve as a traffic officer for the period from 1 August 1987 to 30 June 1988. The WTOE extended the duration of that agreement several times and in particular up to 31 December 1991. From 1 February 1988 he was head of its "Base Traffic Unit".

In a telex of 30 January 1992 the WTOE's Administration and Personnel Service informed heads of department and bases that it was extending the contracts of local staff as from 1 January. But by a memorandum of even date the project manager and the head of the Administration Department of the WTOE informed the complainant that his appointment would terminate "effective 1 February 1992" and they cited clause 2 of the agreement, which read:

> "This agreement shall ... expire ... not later than the above-noted expiration date, unless sooner terminated under the terms of this agreement. Either party may terminate this agreement at any time by giving the other party 30 days' notice in writing of its intention to do so."

The WTOE also said it would pay him one month's salary in lieu of notice.

In letters of 10 February, 30 July and 12 November 1992 he asked the project manager to review the decision. Having got no reply, he is impugning the implied rejection of his claims.

B. The complainant submits that his separation was wrongful on four counts. He submits, first, that it came without written or other warning and in the absence of any reprimand. Secondly, the WTOE gave him no reasons for it. His third plea is breach of equal treatment: the other WTOE employees had their contracts extended. Lastly, he points out that the decision came while the project was in full swing: that was in breach of "the labour laws" of the United Nations and of member countries.

He claims reinstatement, including "payment of salary from the date of termination till now", and costs.

C. In its reply the FAO submits that the complaint is irreceivable because the complainant was never under contract with it. The service agreement he signed identifies the United Nations no fewer than 13 times as the other contracting party and makes it plain in particular that the United Nations shall pay for his services and may terminate the agreement. So any redress he might be entitled to under the agreement he ought to have claimed from the United Nations, with which he concluded the agreement, and not from the FAO. The Tribunal having held in Judgments 1285 (in re Haile-Mariam) and 1286 (in re Mulate) that it lacked competence to entertain a complaint against the FAO by a party to a special service agreement with the United Nations, the Organization does not argue the merits.

CONSIDERATIONS:

1. As was said in Judgments 1285 (in re Haile-Mariam) and 1286 (in re Mulate), the Government of Ethiopia concluded an agreement in 1968 with the World Food Programme (WFP) for the supply of food to support projects for economic and social development and to meet urgent needs for food in that country. The WFP is a joint programme of the United Nations and the FAO. At the material time its local staff were subject to the Staff Regulations and Staff Rules of the United Nations, and the United Nations Development Programme (UNDP) took care of staffing in Ethiopia through its office in Addis Ababa. The 1968 agreement was signed by the UNDP's Resident Representative in Ethiopia as the duly appointed representative of the WFP.

2. The Ethiopian Relief and Rehabilitation Commission has entered into another agreement with the WFP on the Government's behalf to set up what is known as the World Food Programme Transport Operation in Ethiopia (WTOE) to help in the distribution of supplies for emergency relief by providing a fleet of several hundred lorries and other vehicles.

3. The complainant, an Ethiopian citizen, was employed under a special service agreement from 1 August 1987 to 30 June 1988 as a traffic officer for the WTOE in Addis Ababa. He had that agreement extended from time to time. From 1 February 1988 he headed the "Base Traffic Unit" of the WTOE.

4. By a circular in the form of a telex of 30 January 1992 the Administration and Personnel Service of the WTOE announced that the contracts of local staff were in general to be extended from 1 January 1992. But it informed the complainant by a memorandum also of 30 January that his contract was to terminate on 1 February 1992 and that he would be paid one month's salary in lieu of notice.

5. By letters dated 10 February, 30 July and 12 November 1992 the complainant appealed to the project manager of the WTOE against the decision to separate him from service. Having received no reply, he is impugning the implied rejection of his appeal on the grounds that (a) he was given no prior oral or written warning or reprimand; (b) no reasons were stated for the decision; (c) he was refused further extension despite the general decision to extend the contracts of WTOE local staff, being thereby denied equal treatment; and (d) the project was still in full operation and his services were still needed. He claims reinstatement with pay as from the date of termination, and costs.

6. Without addressing the merits, and relying on Judgments 1285 and 1286, the FAO asks that the complaint be dismissed on the grounds that the complainant's special service agreement was with the United Nations, not with the FAO; that his claim, if any, to redress lies against the United Nations; and that the Tribunal therefore lacks competence.

7. The Tribunal accepts that argument. Although in some circumstances an agreement signed by the WFP might have bound the FAO, the special service agreement that the complainant signed stated that it was between him and the United Nations. The fact that it provided for services to the WFP and to the WTOE does not make either of those bodies or the FAO itself a party to the contract or liable thereunder. The conclusion is that the Tribunal is not competent to hear the case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas

William Douglas

E. Razafindralambo

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Traduction du Greffe, seul
le texte anglais fait foi.

SOIXANTE-DIX-SEPTIEME SESSION

Affaire MOLLA **Jugement No 1337**

LE TRIBUNAL ADMINISTRATIF,

Vu la requête dirigée contre l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO), formée par M. Tawye Molla Sharew le 13 juin 1993 et régularisée le 20 août, et la réponse de la FAO du 6 novembre 1993;

Vu l'article II, paragraphe 5, du Statut du Tribunal;

Après avoir examiné le dossier, la procédure orale n'ayant été ni sollicitée par les parties, ni ordonnée par le Tribunal;

Vu les pièces du dossier, d'où ressortent les faits et les allégations suivants :

A. Le Programme alimentaire mondial (PAM) a été créé aux termes de résolutions adoptées par la Conférence de la FAO et l'Assemblée générale des Nations Unies en 1961. Il dépend de la FAO et a son siège à Rome. Il gère en Ethiopie une "Opération de transports", dénommée WTOE d'après son sigle anglais, aux termes d'accords passés avec le gouvernement de ce pays. La WTOE est chargée de distribuer les approvisionnements d'urgence aux zones sinistrées du pays et dispose à cet effet de plusieurs centaines de camions, de tracteurs et de remorques. L'agence gouvernementale compétente est la Commission de secours et de réadaptation, dénommée RRC d'après son sigle anglais. La WTOE et la RRC ont toutes les deux leur siège à Addis-Abeba.

Le requérant, ressortissant éthiopien né en 1955, a signé avec la WTOE, en juillet 1987, un "contrat spécial de service" aux termes duquel il devait assumer les fonctions de responsable des mouvements des véhicules, du 1er août 1987 au 30 juin 1988. La WTOE a prolongé la durée de ce contrat à plusieurs reprises et notamment jusqu'au 31 décembre 1991. A partir du 1er février 1988, le requérant a été chef de l'Unité des mouvements des véhicules de la WTOE.

Par un télex du 30 janvier 1992, le Service de l'administration et du personnel de la WTOE a fait savoir aux chefs de départements et d'unités qu'il prolongeait les contrats du personnel local à partir du 1er janvier 1992. Mais par un mémorandum de la même date, le directeur de projet et le chef du Département de l'administration de la WTOE ont notifié au requérant que son engagement prendrait fin "avec effet au 1er février 1992", conformément à la clause 2 du contrat de service spécial, ainsi conçue :

> "Le présent contrat viendra à expiration au plus tard à la date d'échéance susmentionnée, à moins qu'il n'y soit mis fin plus tôt aux termes du présent contrat. L'une ou l'autre partie peut à tout moment résilier le présent contrat en avertissant l'autre partie par écrit de son intention et en lui donnant un préavis de 30 jours."

La WTOE lui a également fait savoir qu'elle lui paierait un mois de salaire en remplacement du préavis.

Par lettres des 10 février, 30 juillet et 12 novembre 1992, le requérant a demandé au directeur de projet de réexaminer sa décision. N'ayant pas reçu de réponse, il attaque ce rejet implicite de ses demandes.

B. Le requérant soutient que le non-renouvellement de son contrat est injustifié à quatre titres. Il estime tout d'abord que ce non-renouvellement est intervenu sans qu'il en ait été prévenu à l'avance par écrit ou d'une autre façon, et sans qu'il ait fait l'objet d'un blâme quelconque. En second lieu, la WTOE ne lui a pas donné de raisons justifiant sa décision. En troisième lieu, il estime qu'il y a eu violation du principe de l'égalité de traitement, les contrats des autres employés de la WTOE ayant été prolongés. Il fait enfin remarquer que le non-renouvellement de son contrat est intervenu alors même que le projet battait son plein : il s'agissait donc d'une violation de la "législation du travail" des Nations Unies et des pays membres.

Il demande sa réintégration, le "paiement de son salaire à compter de la date à laquelle il a été mis fin à ses fonctions" et des dépens.

C. Dans sa réponse, la FAO soutient que la requête est irrecevable car le requérant n'a jamais été sous contrat avec elle. Le contrat spécial de service qu'il a signé indique, par non moins de treize références, que l'autre partie contractante est l'Organisation des Nations Unies, et précise notamment que c'est elle qui rémunère ses services et qui peut résilier le contrat. Dès lors, toute réparation à laquelle le requérant pourrait avoir droit aux termes du contrat spécial de service devrait être demandée aux Nations Unies, avec lesquelles il a signé son contrat, et non à la FAO. Le Tribunal ayant considéré, dans ses jugements 1285 (affaire Haile-Mariam) et 1286 (affaire Mulate), qu'il n'avait pas compétence pour statuer sur une réclamation adressée à la FAO par une partie à un contrat spécial de service conclu avec les Nations Unies, l'Organisation ne plaide pas sur le fond.

CONSIDERE :

1. Comme il est exposé dans les jugements 1285 (affaire Haile-Mariam) et 1286 (affaire Mulate), le gouvernement de l'Ethiopie a conclu en 1968 un accord avec le Programme alimentaire mondial (PAM) pour la fourniture de produits alimentaires destinés à soutenir des projets de développement économique et social et à répondre aux besoins alimentaires urgents de ce pays. Le PAM est un programme commun des Nations Unies et de la FAO. Au moment des faits, le personnel local qu'il recrutait était soumis aux Statut et Règlement du personnel des Nations Unies, et c'est le Programme des Nations Unies pour le développement (PNUD) qui, en Ethiopie, se chargeait du recrutement et de l'affectation du personnel par l'intermédiaire de son bureau à Addis-Abeba. L'accord de 1968 a été signé par le représentant résident du PNUD en Ethiopie qui avait été dûment désigné pour représenter le PAM.

2. La Commission de secours et de réadaptation, agence gouvernementale éthiopienne, a conclu un autre accord avec le PAM, en vue d'organiser ce que l'on a appelé l'opération de transports du Programme alimentaire mondial en Ethiopie (WTOE selon son sigle anglais); il s'agissait d'aider à la distribution de secours d'urgence en fournissant un parc de plusieurs centaines de camions et autres véhicules.

3. Le requérant, ressortissant éthiopien, a été engagé par la WTOE aux termes d'un contrat spécial de service pour assumer les fonctions de spécialiste des mouvements des véhicules à Addis-Abeba du 1er août 1987 au 30 juin 1988 et a vu son contrat prorogé à plusieurs reprises. Depuis le 1er février 1988, le requérant dirigeait l'Unité des mouvements des véhicules de la WTOE.

4. Dans une circulaire diffusée par télex le 30 janvier 1992, le Service de l'administration et du personnel de la WTOE a annoncé que les contrats du personnel local devraient, d'une manière générale faire l'objet d'une prolongation à compter du 1er janvier 1992. Ce service a néanmoins informé le requérant

par un mémorandum également du 30 janvier que son engagement prendrait fin le 1er février 1992 et qu'il percevrait un mois de traitement en compensation du préavis.

5. Par lettres des 10 février, 30 juillet et 12 novembre 1992, le requérant a recouru auprès du directeur du projet de la WTOE contre la décision de mettre fin à son engagement. N'ayant reçu aucune réponse, il attaque le rejet implicite de ce recours aux motifs : a) qu'il n'a reçu auparavant aucun avertissement ni aucune réprimande, que ce soit oralement ou par écrit; b) qu'aucune raison ne lui a été fournie pour justifier cette décision; c) qu'alors que la décision générale avait été prise de prolonger les contrats du personnel local de la WTOE, il s'est vu refuser un autre renouvellement de son contrat et donc le bénéfice de l'égalité de traitement; et d) que le projet était toujours en cours d'exécution et que ses services étaient encore nécessaires. Il demande sa réintégration, le paiement de son salaire à compter de la date à laquelle il a été mis fin à ses fonctions et des dépens.

6. Sans plaider sur le fond, et en se basant sur les jugements 1285 et 1286, la FAO demande le rejet de la requête aux motifs que le contrat spécial de service du requérant a été conclu avec les Nations Unies, et non avec la FAO, que sa réclamation, à supposer même qu'elle soit fondée, s'adresse aux Nations Unies, et que le Tribunal n'est donc pas compétent.

7. Le Tribunal accepte cet argument. Bien que dans certaines circonstances un contrat signé par le PAM ait pu lier la FAO, le contrat spécial de service signé par le requérant stipulait qu'il était conclu entre lui et les Nations Unies. Le fait que le contrat prévoit la prestation de service au PAM et à la WTOE ne fait ni de l'un ni de l'autre de ces organismes, ni de la FAO elle-même, une partie au contrat, ni ne les rend responsables à ce titre. Il s'ensuit que la présente affaire ne relève pas de la compétence du Tribunal.

Par ces motifs,

DECIDE :

La requête est rejetée.

Ainsi jugé par Sir William Douglas, Vice-Président du Tribunal, M. Edilbert Razafindralambo, Juge, et M. Mark Fernando, Juge, lesquels ont apposé leur signature au bas des présentes, ainsi que nous, Allan Gardner, Greffier.

Prononcé à Genève, en audience publique, le 13 juillet 1994.

(Signé)

William Douglas E. Razafindralambo Mark Fernando

A.B. Gardner

RGANISATION INTERNATIONALE DU TRAVAIL   INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF   *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re MANAKTALA (No. 3)
(Application for execution)

Judgment 1338

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1219 filed by Mr. Kishore Chand Manaktala on 11 September 1993, the reply of 1 November 1993 from the World Health Organization (WHO), the complainant's rejoinder of 10 January 1994 and the Organization's surrejoinder of 24 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. The WHO suspended the complainant from duty without pay on 26 June 1987 and dismissed him as from 1 June 1988. After he had made internal appeals the Director-General upheld that dismissal by decision of 18 September 1990. By Judgment 1133 of 29 January 1992 the Tribunal quashed the Director-General's decision and remitted the case so that the WHO might either resume disciplinary proceedings against the complainant in accordance with due process or pay him financial compensation; it also ordered the provisional payment to him of 1,500 United States dollars and awarded him $200 in costs.

2. By a letter of 25 February 1992 the Director-General informed the complainant that "it would be inappropriate and inadvisable" to resume the disciplinary proceedings and he would be adequately compensated by the payment of the equivalent of two years' salary, less the $1,500 already provisionally awarded to him in Judgment 1133.

3. The complainant did not accept that amount and, as the Tribunal had expressly permitted him in Judgment 1133 to do, filed a second complaint claiming:

(a) the immediate payment of the total sums of $1,700 awarded to him in Judgment 1133, plus interest as from 1 March 1992;

(b) the payment of his salary, plus interest, as from the date of his separation, 26 June 1987, up to the normal date of his retirement, in October 1998;

(c) such pension benefits as would have accrued to him by the normal date of his retirement;

(d) damages for loss of reputation and mental injury; and

(e) a further award of costs.

4. By Judgment 1219 of 10 February 1993 the Tribunal quashed the Director-General's decision of 25 February 1992 insofar as it offered the complainant the equivalent of two years' salary in financial compensation. It ordered the WHO to pay him:

(a) damages equivalent to the amount of the salary, allowances and other entitlements he would have received in the period from the date of his suspension from duty, 26 June 1987, up to 25 February 1992, the date at which the Director-General had chosen not to resume the disciplinary proceedings:

(b) further damages equivalent to two years' salary, allowances and other entitlements, to be reckoned at the rates that had prevailed at 25 February 1992;

(c) three months' interest at the rate of 10 per cent a year on the awards of $1,700 already made; and

(d) $200 in costs.

5. On 14 May 1993 the WHO paid the complainant 1,041,037 Indian rupees, which included the interest and costs awarded. In working out the figure it had taken account of normal within-grade increments and salary revisions for the period up to 25 February 1992 but not for the period after that date.

6. The complainant did not accept the WHO's interpretation of Judgment 1219. In his view the essence of that judgment was that he must be considered to be in uninterrupted service with full pay until 25 February 1994. He accordingly claimed the following further benefits:

(a) two two-step within-grade increases for meritorious service, one falling due on completion of 25 years' satisfactory service, in August 1988, and the other on completion of 30 years' satisfactory service, in August 1993;

(b) normal within-grade increments for the period from 26 February 1992 to 25 February 1994;

(c) deductions from salary for accident and sickness insurance, which would enable him to make claims for the period after 26 June 1987; and

(d) restoration of participation in the United Nations Joint Staff Pension Fund.

He also claimed interest on account of the delay in payment, which he reckoned at two months and five days from the expiry of thirty days after the date of Judgment 1219.

7. By a letter it sent him on 7 July 1993 the WHO rejected those claims. It said that if the Tribunal had intended to award him all those benefits it would have ordered reinstatement instead of only awarding damages and that for the period after 25 February 1992 the Tribunal had itself limited the amount of damages to the rates of salary, allowances and other entitlements that had prevailed at that date.

8. The complainant is impugning the Organization's decision of 7 July 1993, adding a claim to payment of the value of 210 days' accrued annual leave for the period from 26 June 1987 to 25 February 1994.

9 All but one of his claims fail.

10. Although Judgment 1133 declared his dismissal null and void it did not order reinstatement. Instead it gave the WHO two options. Had the Organization preferred to resume disciplinary proceedings against him it would have had to treat him as remaining in service from 26 June 1987 until the proceedings were over. But it exercised the alternative option of paying him financial compensation: that was in lieu of reinstatement and on the assumption that his separation from service had occurred on 26 June 1987. Accordingly Judgment 1219 did not assess compensation on the basis of any actual or notional reinstatement from 26 June 1987 but simply awarded him damages equivalent to "the amount of the salary, allowances and other entitlements he would have received" in the period from 26 June 1987 to 25 February 1992. Those entitlements were to include payments similar in nature to the salary and allowances directly received by an employee in the usual course of his career, such as periodic salary revisions and normal increments. They were not to include benefits accruing from actual reinstatement, such as participation in the Pension Fund, health insurance coverage, any salary increases dependent upon assessment of the quality of actual service - such as within-grade increments for meritorious service - or non-financial entitlements such as annual leave. Furthermore,

in computing the sums the complainant was entitled to for the period after 25 February 1992 the WHO was right to ignore increases of any kind in that period since, as the Organization observes, the Tribunal itself had limited the amount to the rates prevailing at that date.

11. Yet, as Judgment 553 (in re Usakligil No. 2) affirmed, an international organisation which has recognised the Tribunal's jurisdiction is bound, not merely to refrain from acting in disregard of a judgment, but to take whatever action the judgment may require. In line with the ruling in, for example, Judgment 234 (in re Chawla No. 2) an organisation must, where a specific sum has been awarded, pay compensation if it takes more than one month to pay after the judgment was notified, save that if, as in Judgment 1219, the Tribunal does not put a figure on the amount due, the need to work out the figure warrants allowing additional time.

12. In this instance headquarters in Geneva sent a memorandum on 19 March 1993 to New Delhi giving the Regional Director there details of the amount due "for your implementation". Apart from alleging the need for consultations the Organization has offered no explanation for the delay in payment. The Tribunal therefore awards the complainant payment of interest at the rate of 10 per cent a year for a period of 30 days as fair compensation for that delay. But it will make no award of costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant interest on the amount awarded in Judgment 1219, to be reckoned at the rate of 10 per cent a year for a period of thirty days.

2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

RGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re GRANT Judgment 1339

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Donald Marcus Grant against the World Health Organization (WHO) on 17 August 1993 the WHO's reply of 17 December 1993, the complainant's rejoinder of 21 January 1994 and the Organization's surrejoinder of 18 February 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 760 and 1230;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. WHO Staff Rules 760.1 and .2 read as follows:

> "760.1 Staff members appointed for periods of one year or more shall be entitled to maternity leave with full salary and allowances.
>
> 760.2 Any such staff member, on presentation of a certificate from a duly recognized medical practitioner stating that her confinement will probably take place within six weeks, shall be allowed to absent herself from her duties until her confinement. At the request of the staff member and on medical advice, the Director-General may permit the maternity leave to commence less than six weeks but not less than two weeks before the expected date of confinement. Maternity leave shall extend for a period of 16 weeks from the time it is granted, except that in no case shall it terminate less than ten weeks after the actual date of confinement."

The complainant, a British subject, is employed by the WHO in Geneva as a scientist at grade P.5.

On 21 July 1992 he and his wife, who is employed at the Office of the United Nations High Commissioner for Refugees (UNHCR), also in Geneva, sent a memorandum both to the Chief of Contract Administration in the Division of Personnel of the WHO and to the Director of Human Resources Management of the UNHCR. They said that their first child was to be born in September 1992 and applied for permission to share between them the sixteen weeks' leave prescribed in WHO Staff Rule 760 and in a similar rule in the United Nations.

By a memorandum of 23 July the Chief of the Personnel Administration Section of the UNHCR told the complainant's wife that though she was entitled to sixteen weeks' maternity leave the grant of paternity leave was a matter for the WHO to determine.

In a memorandum of 28 July the Chief of Contract Administration of the WHO informed the complainant that he was rejecting the application because the rules did not prescribe the grant of paternity leave.

In a memorandum of 30 July the complainant asked how he might appeal and by a memorandum of 18 August the Chief of Contract Administration referred him to Staff Rule 1230 ("Boards of Appeal").

In a memorandum of 27 August 1992 to the secretary of the headquarters Board of Appeal he gave notice of appeal under Rule 1230.1.2 on the grounds of "incomplete consideration of the facts". On 4 September he submitted a formal statement of appeal.

His wife gave birth to a daughter on 11 September.

In its report of 23 February 1993 the Board noted that the Administration had properly applied Rule 760 but recommended reviewing it because of its "discriminatory" nature.

In a letter of 20 May 1993 the Director-General rejected his appeal on the grounds that the WHO had applied Rule 760 "as it stands" and the Board had exceeded its competence by declaring the text discriminatory. That is the impugned decision.

B. The complainant submits that the WHO discriminated against him on the grounds of sex. Since the purpose of Rule 760 is not only to allow the mother to prepare for and recover from childbirth but also to permit "bonding" between parent and child, the father too should be entitled to a share of leave. The Organization's policy on adoption leave, which staff of either sex may take, bears that out.

He believes that the WHO should take the lead in the common system of the United Nations by letting parents who both work in the system to share a single leave entitlement. The International Committee of the Red Cross, another organisation in Geneva, though one outside the common system, already provides for the sharing of "maternity leave".

His acceptance of the Staff Regulations and Staff Rules does not bar him from challenging a provision he regards as "gender-specific". As it is being applied Rule 760 discriminates against the father by limiting his share of "parenting responsibilities".

The rule may damage the mother's career prospects because her employer may be inclined to give preference to another staff member who is not entitled to maternity leave.

He seeks the quashing of the Director-General's decision of 20 May 1993 and the conversion into "parental leave" of fifteen days' annual leave which he took in November and December 1992 to spend more time with his daughter.

C. In its reply the WHO contends that the complaint is devoid of merit.

It is not the purpose of the appeal procedure to enable staff to seek changes in the rules: the complainant should have tried other procedures or turned to the Staff Association if he wanted the introduction of paternity leave. The rules on maternity leave being the same throughout the United Nations common system, the WHO may not change them on its own.

In any event the UNHCR had ruled out the sharing of his wife's maternity leave even before the WHO turned his application down. So it would have been more appropriate for her to appeal to her own employer.

The WHO denies that the grant of paid maternity leave is discriminatory: it affords a woman protection for reasons "inherent in her physical nature". The needs of an adoptive parent - which may include travel and stays in the country of adoption - are quite different from those imposed by confinement. Rule 760 provides for maternity leave, not - as the complainant mistakenly puts it - for "gender-specific" parental leave.

His suggestion that maternity leave may hamper the mother's career prospects merely shows how important it is to strengthen her right to such leave.

D. In his rejoinder the complainant enlarges on his earlier pleas. He says that it was the WHO that advised him to lodge an appeal and it was therefore to blame if he took the wrong course. He would have been satisfied with some ad hoc arrangement. It was the Board of Appeal that called for review of Rule 760.

As "parenthood" includes motherhood, maternity leave is "gender-specific" parental leave. The WHO's refusal to let parents share leave offends against several international instruments on human rights, including the Charter of the United Nations.

E. The WHO contends that it did not mislead the complainant: he himself preferred litigation to constructive dialogue. There is no provision for parental leave in the United Nations system. The United Nations Convention on the elimination of all forms of discrimination against women - one of the instruments he relies on - actually says in Article 4(2) that "adoption ... of special measures ... aimed at protecting maternity shall not be considered discriminatory".

CONSIDERATIONS:

1. The complainant is a staff member of the WHO at grade P.5 and his wife a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) at grade P.3. The rules of both organisations prescribe sixteen weeks' maternity leave. The complainant's wife was expecting to give birth in September 1992. On 21 July 1992 they applied to both the organisations for the grant of "parental" leave, the sixteen weeks' leave to be made available to them as a couple and shared as agreed between themselves and with their employers.

2. In a memorandum of 23 July the Chief of the Personnel Administration Section of the UNHCR answered the complainant's wife that she was entitled to the sixteen weeks' maternity leave under the staff rules and that the entitlement of her husband to paternity leave was a matter for the WHO to decide.

3. In a memorandum of 28 July to the complainant the Chief of Contract Administration of the WHO referred to Staff Rule 760, which provides for the sixteen weeks' maternity leave for a staff member appointed for a period of one year or more, said he regretted that there were "no provisions for paternity leave", and refused the complainant's application.

4. The complainant appealed to the WHO's headquarters Board of Appeal. In its report dated 23 February 1993 the Board held that the Administration had correctly applied Rule 760 as it stood, but that it was "discriminatory against male staff members, bearing in mind the objectives of WHO and the UN family and the discrepancy with conditions applying to adoption leave"; so the rule was "inherently flawed" and "the Administration should review it in view of its discriminatory nature".

5. By a letter dated 20 May 1993 the Director-General of the WHO informed the complainant that he accepted "the finding that the Administration had applied the Staff Rule as it stands to you" and was therefore dismissing the appeal; as for the Board's view that the rule was flawed and should be reviewed, it had gone beyond its mandate. That is the decision now impugned.

6. The complainant's wife gave birth on 11 September 1992. Having been refused "parental leave", he took fifteen days' annual leave "in order to be able to spend time with my newborn daughter". He wants the Tribunal to set aside the Director-General's decision and retroactively convert the fifteen days' annual leave to parental leave. He has four main pleas:

(a) The grant of leave only to the mother is discriminatory because bonding is as important between father and child as between mother and child.

(b) Adoption leave makes no distinction on the grounds of sex.

(c) What he wants is not an increase in parental leave but only that the present entitlement be shared between the parents when both are employed by organisations that belong to the United Nations common system. The International Committee of the Red Cross allows the sharing of leave if both spouses are its employees.

(d) The fact that only the mother is entitled to leave under the rules creates a risk of discrimination against her in that she may be passed over in her career if she takes her full entitlement.

7. The grant of maternity leave is not a form of discrimination against men but mere recognition of the needs specific to a woman when she gives birth. There are both physical and psychological reasons why a woman should be relieved of work before and after the birth. The nature of the father's involvement being quite different, like is not being compared with like.

8. Legislation in some countries does provide for the grant of paternity leave. It is true it may be seen as beneficial: it allows sharing of the practical burdens of child care; it may serve to alter social attitudes by dispelling the idea that child care is the sole responsibility of the mother; and it is psychologically useful in that it enables the father to become more closely involved in the child's early development. But parental leave is something to be negotiated and agreed with the employer: it may not be claimed as of right. The WHO's rules provide for the grant of maternity leave, not of paternity or parental leave, and until the latter is agreed upon or prescribed the right to it does not exist.

9. The comparison that the complainant draws with the grant of leave on the adoption of a child is mistaken. The requirements of adoption being different from those of confinement, arrangements pertaining to adoption need not be specifically directed at the woman. There is no discrimination in favour of adoptive and against natural parents since the circumstances are not the same.

10. Parental leave, which is not the same as maternity leave, is not prescribed in the WHO and the fact that the International Committee of the Red Cross may grant it is immaterial.

11. The arguments the complainant founds on the risk of discrimination against women in employment are also irrelevant: he may plead his own case, not that of others.

12. The Organization contends that his case is misdirected on the grounds that on taking up employment he accepted its Staff Regulations and Rules and he ought to have made use of other means, such as staff union action, of putting forward his views and securing the introduction of paternity leave. The contention is mistaken. An official's acceptance of the Regulations and Rules does not preclude his arguing that some provision of them is discriminatory as it affects him. If the Organization's argument were sustained no staff member would be free to challenge a rule. The comlainant is entitled to found his case on the plea of discrimination even though in the event it proves unsuccessful.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

RGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re VOLLERING (No. 3) Judgment 1340

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 5 November 1993, the EPO's reply of 24 January 1994, the complainant's rejoinder of 28 February and the Organisation's surrejoinder of 12 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 106 to 109 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen, is employed by the EPO as a patent examiner at grade A3 in Directorate-General 1 (DG1) at The Hague.

On 3 June 1992 he lodged an internal appeal under Articles 106 to 108 of the Service Regulations against the imposition of a computer programme known as "computer-assisted editing of search and annex reports", or CAESAR. The President of the Office referred his appeal to the Appeals Committee on 29 June 1992.

The Administration's reply of 18 May 1993 contained the text of a note which the Principal Director of Search had sent to the Personnel Department on 12 June 1992 and which included the remarks that the complainant "seems to require a lot of time to do anything" and his "main contribution to the EPO would appear to lie in the field of time deductions".

On 14 June 1993 the complainant filed a second appeal asking the President to offer an apology for the harm he said the note had caused him; to circulate among certain staff members an official denial of the allegations in it; and to replace the Principal Director with someone other than a subordinate as the countersigning officer for reports appraising the complainant's performance in periods since 1991.

In a letter of 15 June the complainant asked the chairman of the Committee not to take up his appeal of 3 June 1992 until he could answer the allegations by the Principal Director. The chairman accordingly adjourned his appeal to November 1993.

By a letter of 30 June the Director of Staff Policy told him on the President's behalf that since the note of 12 June 1992 was part of the Administration's reply to his appeal of 3 June 1992 he was free to comment on the note in his rebuttal of that reply.

On 28 July 1993 the Principal Director wrote to him referring to his note of 12 June 1992, admitting that his criticism of deduction of time for writing an article was unfounded and apologising unreservedly for having made the statement, which was "not based on fact".

The complainant impugns the inferred rejection under Article 109(2) of his claims of 14 June 1993.

B. The complainant submits that the EPO has failed to address his claims. The letter of 30 June 1993 from the Director of Staff Policy ignores them, and the note of 28 July from the Principal Director is not a substitute for the official denial he wants from the President of the Office.

The Administration's failure to replace his countersigning officer has left him open to such biased remarks as the one the Principal Director appended to his 1992 appraisal report on 1 June 1993, that he showed "reckless disregard for the efficiency and well-being of the Office".

He seeks an award of 25,000 guilders in moral damages, including 5,000 for the Administration's failing to apologise for injury caused by the note of 12 June 1992, 10,000 for its failing to circulate a formal correction of the unfounded allegations and innuendos in the note, and 5,000 for its ignoring his claims of 14 June 1993. He also wants the Tribunal to order the EPO to meet his claims and pay him 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is irreceivable. Since the note the complainant objected to was part of the Administration's brief in his first appeal he should have commented on both at the same time. Instead he mistakenly singled the note out and then went to the Tribunal without first exhausting the internal means of redress. Besides, the Principal Director having apologised on 28 July 1993 for a statement "not based on fact", he had no cause of action. It is premature for him to ask for the appointment of another countersigning officer for his reports for 1992 and later years: he must wait for the outcome of the conciliation proceedings he has requested on his 1992 report before lodging such an appeal.

In subsidiary argument the EPO contends that the only apology worth having comes from the official at fault, not from the Administration. Since the Principal Director apologised and circulated his apology, the complainant is wrong to accuse the President of ignoring his claims. Not only do his claims to moral damages go beyond those in his letter of 14 June 1993, but he does not back them up with argument.

D. In his rejoinder the complainant rebuts the EPO's pleas on receivability. Neither the subject of his first appeal nor the redress he was seeking has anything to do with this dispute. The "apology" from the Principal Director was not a decision of the President's; besides, it concerns only part of the note he was objecting to. He gave the President four-and-a-half months to take a decision on the claims in his letter of 14 June 1993 before he went to the Tribunal.

The Principal Director's bias being plain from his note of 12 June 1992, the complainant sought impartial protection of his basic rights from the President. The "apology" from the Principal Director aggravated the injury by ignoring some misrepresentations in the original note and making a new one. There being serious doubts about the Principal Director's impartiality, the President had a duty to replace him as countersigning officer to ensure the "neutrality" of reporting.

He broadens his claims to include 5,000 guilders in moral damages for each of the staff reports the Principal Director countersigns, starting with the one for 1992.

E. In its surrejoinder the EPO says there are no arguments in the complainant's rejoinder that might lead it to change its position. Nor does anything in his performance reports bear out his allegations of bias. His new claim to damages is irreceivable since it rests on hypothetical injury which the evidence does not bear out.

CONSIDERATIONS:

1. On 3 June 1992 the complainant lodged an internal appeal - No. 18/92 - with his employer, the European Patent Organisation, objecting to the compulsory use of a computer programme known as CAESAR. On 29 June his appeal was transmitted to the Appeals Committee.

2. While considering his appeal the Personnel Department had asked for a note from his supervisor, the Principal Director of Search, who wrote one on 12 June 1992. The text, which was headed "Note for the Personnel Department", was not brought to the complainant's notice until nearly a year later in the course of the internal appeal proceedings. The last paragraph read:

> "That Mr. Vollering personally requires a lot of time for using the CAESAR system would not surprise me since he seems to require a lot of time to do anything. At my request he once prepared a (well written) article for the house magazine (EUREKA) ... According to the time deducted, this took Mr. Vollering 3 weeks to do. Furthermore, I note that, in 1991, Mr. Vollering deducted 58.7 days for tasks in staff representation. Considering that Mr. Vollering is not an elected person, it is interesting to compare this figure with the 46 days deducted by an elected person who was also Chairman of the Staff Union. To sum up, Mr. Vollering's main contribution to the EPO would appear to lie in the field of time deductions."

3. In a letter of 14 June 1993 the complainant set out at length his objections to the note of 12 June 1992 and asked the President of the Office:

> "on behalf of the EPO administration to apologise for the harm to me caused by [the note]."
>
> "to write on behalf of the EPO a statement rectifying the false declarations, insinuations and prejudicial allegations made [in the note]; and to send this statement" to him and to a list of EPO officials he named;
>
> "to replace [the Principal Director of Search] as the Countersigning Officer by a person not under his supervision, for all [his] Staff Reports following the period 1990-1991."

In conclusion he said that, if the President declined, his letter was to be taken as lodging a further internal appeal under Articles 106 to 108 of the Service Regulations.

4. A letter which the Director of Staff Policy wrote him in reply on 30 June 1993 said that the note of 12 June 1992 was "not a report within the meaning of Article 47 of the Service Regulations" but a document written and submitted in the course of internal appeal proceedings under Article 108(1) of the Service Regulations; it was open to him to comment in answering the EPO's reply to appeal 18/92.

5. The Principal Director of Search sent the complainant a note dated 28 July 1993 which said:

> "In my note of June 12, 1993 [recte 1992] to the Personnel Department I expressed strong criticism of the time I said you had deducted for the preparation of an article in EUREKA. This was based on my recollection of the deduction which you communicated to me verbally at the time in question.
>
> A subsequent check has shown that this criticism was unfounded and that no such deduction had been made.
>
> I apologise unreservedly for having made this statement which was not based on fact."

6. The Appeals Committee took up appeal 18/92 in November 1993. The complainant's further brief did not mention the Principal Director's note of 12 June 1992 but at a meeting of the Committee he put to it in writing a request dated 10 November that it "ignore" the note and he appended thereto a copy of the present complaint to the Tribunal. The Committee in its report recorded his request and did not in fact cite the note of 12 June 1992.

Receivability

7. The Organisation argues that there was "every justification" for the complainant's "consolidating the internal appeal protesting" against that note with appeal 18/92, that he was therefore wrong in "excluding this document" from the latter appeal, and that since he has failed to exhaust the internal means of redress on that score his complaint is irreceivable insofar as it objects to the note.

8. When he first protested against the note in his letter of 14 June 1993 to the President he asked that if the President refused his request for redress the letter should be treated as lodging an internal appeal under Articles 106 to 108. Having refused his request, the President was obliged to deal with the matter as an internal appeal. Article 109 provides:

> "(1) If the President of the Office or, where appropriate, the Administrative Council considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee as provided for in Article 110 shall be convened without delay to deliver an opinion on the matter; the authority concerned shall take a decision having regard to this opinion. Extracts from the decision may be published.
>
> (2) If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected. ...

> (3) When all the internal means of appeal have been exhausted, a permanent employee ... may appeal to the Administrative Tribunal of the International Labour Organisation under the conditions provided in the Statute of that Tribunal."

So the complainant is correct in saying he is entitled to lodge a separate internal appeal against any allegations or insinuations in the note that he may take to be false and damaging. It gave rise to a new cause of action that was independent of the compulsory use of the CAESAR programme. The President did not convene the Appeals Committee to hear his appeal on that score and therefore, under Article 109(2), rejection was implied two months after the lodging of the appeal. That is the decision impugned. Under Article VII(2) of the Tribunal's Statute the complainant had ninety days from the date of the implied rejection in which to lodge a complaint, he observed the time limit, and his complaint is therefore receivable.

The merits

9. The Organisation submits that it is devoid of merit because he received from the Principal Director of Search the note of 28 July 1993 withdrawing the allegations he had objected to and offering an apology.

10. The plea is mistaken. The Principal Director withdrew only one allegation, about the time the complainant had taken to write an article, and apologised for the factual inaccuracy therein. He made no withdrawal of the other allegations or any apology for them. In that he apologised for only the one allegation he might be deemed to be reaffirming his other allegations. The note of 12 June 1992 is highly sarcastic in tone and the remarks it contains are seriously damaging for any supervisor to make about a subordinate if they are untrue. The Organisation did not ask the Principal Director to substantiate his allegations, and it is still maintaining that the note contains - apart from the acknowledged inaccuracy - only remarks of a general nature and that the complainant has offered no evidence showing them to be untrue. In point of fact he appends to his complaint a letter addressed on behalf of the Central Staff Committee to the President on 2 July 1993 which states that the amount of time off which the Principal Director said he spent on staff activities is excessive.

11. At all events the onus of proof lies on the Organisation to bear out its allegations and insinuations and not, as the Organisation submits, on the complainant to show them to be untrue. In the absence of any proof of their accuracy the assumption must be that they are untrue.

12. The EPO has not responded at all to the complainant's situation. What he sought was an acknowledgement from it that what had been alleged against him was untrue, the form to be two-fold: an apology from the President for the harm caused and a statement correcting the untrue allegations. He got neither.

13. The Organisation pleads that an apology is of value only if it comes from the author of the note. That is too narrow a view. The complainant had a legitimate grievance and was entitled to have his good name vindicated by the Organisation. The least he was entitled to was an acknowledgement that the allegations were untrue, and indeed an apology would have been a gracious addition.

14. The complainant was entitled to redress for the harm caused to him by the untrue allegations. Subordinates are vulnerable to criticism by superiors and if criticism is untrue must be protected from unjust attack. In this case there was a duty on the Organisation to make an investigation. Since it failed to take any such action the complainant is awarded moral damages for its failure to protect and vindicate his good name. The amount is set at 10,000 guilders. He is also awarded costs.

15. The complainant has asked that the Principal Director of Search should not act as countersigning officer for his staff reports after 1990-91. The EPO submits that his claim is premature because his first report after 1990-91 was the one for 1992 and at the time of the Organisation's reply to the complaint it was the subject of the conciliation procedure which is provided for under the guidelines on staff reports and which the complainant had applied for on 18 September 1993. The Organisation submits further that if after the procedure has been completed he is dissatisfied with the outcome he may lodge an internal appeal.

16. The Tribunal agrees. The complainant is entitled to ask the President to take a decision on that matter and may then lodge an internal appeal if dissatisfied with it.

DECISION:

For the above reasons,

1. The Organisation shall pay the complainant the sum of 10,000 guilders in damages for moral injury.
2. It shall pay him 500 guilders in costs.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

E. Razafindralambo

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re GLENN (Joseph) Judgment 1341

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joseph Glenn against the European Patent Organisation (EPO) on 28 October 1993, the EPO's reply of 21 January 1994, the complainant's rejoinder of 15 February and the Organisation's surrejoinder of 25 March 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 62(7), 84(1)(b), 89, 90, 92(2) and 107 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 90(1) of the EPO Service Regulations reads:

> "The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave provided for in ... these Regulations, and for determining ... whether a permanent employee is suffering from permanent invalidity which prevents him from performing the duties attaching to his employment at the Office.
>
> It shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner. ..."

and Article 89(1) provides:

> "The Invalidity Committee shall consist of three medical practitioners:
>
> - the first appointed by the President of the Office;

- the second appointed by the permanent employee concerned; and
- the third appointed by mutual agreement between the first two."

The complainant, a British subject who was born in 1951, joined the staff of the EPO in 1984 as a lawyer at grade A3 in Directorate-General 5 (DG5) in Munich. In February 1992 he was found to be suffering from scarlet fever, which infected the eardrum, and had tinnitus and acute pain in his right ear. Surgery and drugs afforded no relief in the months that followed. On 12 February 1993 he underwent a mastoidectomy, which entailed cutting off his ear and sewing it back on. Although the operation checked the infection it did not cure the tinnitus.

On 25 February the chairman of the Invalidity Committee examined the complainant, as did its third member, the one appointed under Article 89(1) of the Service Regulations "by mutual agreement". In a report dated 12 March 1993 the Committee said that since there was no organic cause of his tinnitus he should have four months' extended sick leave for "neurological" treatment, if possible as an in-patient in a psychiatric ward.

By a letter of 1 April 1993 the Director of Personnel informed him that the Committee had decided to extend his sick leave by four months as from 1 April 1993; in that period he would draw half his basic salary providing he followed the "full range of treatment" which the Office's medical officer and his own doctor prescribed.

In a letter of 4 April to the Vice-President of DG5 the complainant alleged flaws in the Committee's composition: the Administration had not made plain that the third member was a subordinate of the chairman in his capacity as chief medical officer in the Munich City Council's Department of Health. He disputed the validity of the Committee's recommendations and sought the removal of its report from his file, review of the decision to put him on half pay and the setting up of a new Committee with a different chairman.

By a letter of 7 April to the Director of Personnel he appealed against the decision to put him on half pay and pressed the claims in his letter of 4 April to the Vice-President: the Committee, he said, had forced him to choose between going into a psychiatric ward and compromising the welfare of his wife and children through loss of income.

The parties having agreed to replace the third member, though not the chairman, the complainant withdrew his appeal in a letter dated 11 May 1993 to the Director of Personnel.

The complainant then appointed a neuro-psychiatrist to a new Committee. In a letter of 21 June 1993 the neuro-psychiatrist informed the chairman that the complainant had responded to out-patient treatment for "reactive depression" and no longer required neurological or psychiatric treatment; he also submitted the name of an ear, nose and throat specialist to serve as the Committee's third member.

The parties having agreed to his appointment as third member, the specialist informed the chairman by a letter of 26 July 1993 that the complainant was suffering progressive loss of hearing and a degree of tinnitus that impaired concentration; his disability for work was 40 per cent.

By a letter of 13 August the Director of Personnel told him that the Committee had said, in a report of 12 August that was appended, that it saw no need to extend his sick leave nor any evidence of permanent disability within the meaning of Article 62(7) ("sick leave"); he must therefore report for duty on 16 August. That is the decision he impugns.

By a letter of 16 August to the Director of Personnel he tendered his resignation. The Director accepted it with immediate effect on the President's behalf in a letter dated 17 August.

On 24 October 1993 the complainant lodged an appeal against the decision of 13 August claiming, among other forms of relief, the reversal of the President's acceptance of his resignation.

B. The complainant submits that the Invalidity Committee whose report gave rise to the impugned decision failed to comply with the requirements of the Service Regulations. He has two main pleas.

He objects first to the composition of the Committee. Its chairman lacked integrity by putting on the first Committee a subordinate - a psychiatrist - who was bent on diagnosing mental illness. To keep the chairman from appointing another prejudiced psychiatrist to the new Committee the complainant had to appoint his own psychiatrist in preference to an ear, nose and throat specialist.

His other objection is to the procedure the Committee followed. The Administration never made the rules plain: two of its members acted as if the German rules on assessing invalidity applied, and they did not. The chairman failed to consult the other members of the Committee and drafted its report on his own. It never even considered reducing his working hours, as it could have done. He resigned only because he mistakenly assumed that its opinion was "fair and valid" and therefore acquiesced in what he sees as "constructive dismissal".

He seeks (1) the convening of a new Invalidity Committee "with clear rules of procedure"; (2) the destruction of the Invalidity Committee's records on his case; (3) the quashing of the President's decision to accept his resignation; (4) an order of payment of the expenses he incurred in attending meetings of the new Committee; and (5) replacement of the EPO's medical officer with one "not connected to Munich City Council Health Department".

C. In its reply the EPO submits that his claim about resignation is irreceivable. Before he could challenge the President's acceptance of his resignation he had to exhaust the internal remedies open to him under the Service Regulations. Under Article 107(2) direct appeal to the Tribunal lay only against decisions taken after consultation of the Invalidity Committee: the acceptance of his resignation was not such a decision.

On the merits the EPO denies flaws in the Committee's composition and procedure. The complainant had agreed that the same chairman who had considered his case in February 1993 should review it at the end of his extended sick leave. He puts forward no evidence of any lack of integrity in the chairman. He freely chose the second member, who himself proposed the ear, nose and throat specialist who served as the third.

The material rules of procedure are in the Service Regulations. For the sake of its independence the Committee's deliberations are kept secret: Article 92(2) requires disclosure only of the recommendation and the reasons for it. Since all three members signed the report it is insulting to suggest that any of them did so without first examining it. Besides, informal consultations between the members of the Committee "normally take place". The Committee expressly referred to the applicable Regulations when it concluded that the state of the complainant's health showed no evidence of permanent invalidity likely to prevent him from carrying out his duties at the Office. There is no evidence that the Committee failed to consider the possibility of shorter hours. In any event the complainant has no-one but himself to blame for tendering his resignation.

D. In his rejoinder the complainant disputes the arguments in the EPO's reply. His doctors say there was no consultation between the members of the Committee on his case, nor did it consider putting him on part-time work. He sets out his reasons for questioning the suitability of the chairman. Inasmuch as Article 90 of the Service Regulations requires that invalidity be assessed on the basis of the staff member's duties, why did the secretary of the Committee not give the Committee the text of his job description? When he decided to resign he thought returning to work would damage his mental health; only later did he realise there was an alternative to resignation.

E. In its surrejoinder the EPO observes that there are no arguments in the rejoinder that might cause it to change position. In its submission his entire case rests on two accusations: that the Administration and its medical officer are disreputable and that the other two doctors are incompetent. Neither is substantiated.

CONSIDERATIONS:

1. The EPO employed the complainant from 1 July 1984 until his resignation, on 16 August 1993. On 13 February 1992 he was found to be suffering from scarlet fever and it caused ear infection. He underwent three operations between March 1992 and February 1993. In March 1993 an Invalidity Committee established under Article 89 of the Service Regulations of the European Patent Office recommended extending his sick leave by four months. He is not appealing against that decision.

2. On 13 July 1993 a second Invalidity Committee again considered his case. It found that although he was still suffering from tinnitus medication was no longer necessary. It noted further loss of hearing and assessed at 40 per cent the reduction in his capacity to work. It held that he was suffering neither from "permanent invalidity" within the meaning of the Service Regulations, nor from any permanent invalidity which prevented him from carrying out his duties and that no extension of sick leave was necessary. The complainant is impugning that decision, which the Director of Personnel notified to him by a letter of 13 August 1993.

3. The complainant contends that the EPO was culpably negligent in failing to establish rules of procedure for the Committee that required its members to meet or at least communicate by telephone to discuss their decision. He seeks an order that the Committee be reconvened and given clear rules of

procedure. He says that, contrary to what its report stated, each of the doctors constituting the Committee examined him separately.

4. The Tribunal holds that, even if that was so, the impugned decision remains valid nevertheless because there were two aspects to the complainant's illness: loss of hearing and severe reactive depression. The doctors concurred in finding that the tinnitus was chronic but that he was suffering from no organic, neurological or psychic illness of note. They concluded that there was further loss of hearing in the inner ear which, in the opinion of one of them, the ear, nose and throat specialist, accounted for a 40 per cent reduction in his capacity to work. Such disability was insufficient to warrant a finding of "permanent invalidity totally preventing him from performing" his duties within the meaning of Article 84(1)(b) of the Service Regulations.

5. The complainant seeks an order cancelling his resignation, which the Organisation accepted on 17 August 1993. Unlike his challenge to the decision on the grounds of the Invalidity Committee's findings, this claim is irreceivable because he has failed to avail himself of the internal means of redress provided under Article 107 of the Service Regulations and so to satisfy the condition of receivability laid down in Article VII(1) of the Tribunal's Statute.

6. His claims to destruction of the records of the Invalidity Committee on his case, to repayment of expenses incurred in attending meetings of a new Invalidity Committee and to the appointment by the EPO to such a Committee of a doctor who has no connection with the Department of Health of the City of Munich are all contingent on the success of his principal claim. Since that claim fails, so too must the accessory claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas

William Douglas

Mella Carroll

Mella Carroll

E. Razafindralambo

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

SEVENTY-SEVENTH SESSION

In re BALIGA

Judgment 1342

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kalyanpur Yeshavantha Baliga against the World Health Organization (WHO) on 20 September 1993, the WHO's reply of 18 November, the complainant's rejoinder of 29 December 1993 and the Organization's surrejoinder of 24 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 1040, 1050 and 1230 and WHO Manual paragraphs II.9.255 and II.9.260;

Having examined the written evidence and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India who was born in 1934, first joined the staff of the WHO in 1971. He served in Kenya on a grade P.5 post for a sanitary engineer until 1975 and in a similar post in Ghana until 1981. At his own request he was then put on leave without pay. In 1983 he was transferred to he Community Water Supply and Sanitation (CWS) programme in ganda on a post graded P.4 and was later promoted to grade P.5 hen the post was reclassified.

By a letter of 5 February 1988 the WHO's Regional Office or Africa, in Brazzaville, informed him that the funding of is post and his appointment would be terminated at 30 June 988. It nevertheless informed him by a telegram of 7 June hat it was extending his contract until 30 September 1988, and y a letter of 11 July, which he got on 1 August, it confirmed he notice of termination at that date.

On 12 November 1988 he lodged an appeal under Staff Rule 230 with the regional Board of Appeal on grounds of personal rejudice on the part of his supervisors and other officials, ncomplete consideration of the facts and failure to apply the taff Rules correctly. On 20 July 1990 the Board recommended ejecting his appeal as devoid of merit. The Regional Director ndorsed the recommendation and so informed him in a letter of March 1991.

On 27 May 1991 he appealed against the Regional Director's ecision to the headquarters Board of Appeal which held in its report of 13 April 1993 that the termination of his appointment was "flawed by the play of personal prejudice" and recommended reinstatement. But by a letter of 1 June 1993, the impugned decision, the Director-General rejected the Board's recommendation. He also declared the complainant to be in part to blame for delay in the appeal proceedings.

B. The complainant contends that the reason for the termination of his appointment was prejudice on the part of his supervisors and other officials. He alleges that he was indeed the victim of prejudice from the time he took up duty in Uganda. The first of his two supervisors, having sought in vain to get another staff member appointed in his place, waged a campaign to discredit him and even went so far as to accuse him of complicity in crime.

He displeased his second supervisor by pointing out errors of judgment and aroused the resentment of WHO officials by making constructive criticism at a Regional Office meeting. Several government officials too were prejudiced against him. The upshot was the abolition of his post.

The Organization has made out that it was the Government of Uganda that took final decisions on budgeting and that his post was abolished for lack of funds. That is quite untrue: the WHO's Representative agreed to funding of the programme for 1988-89 at least and at no time had the Government said that it wanted his post done away with. Indeed it had asked to have his appointment extended. Against its wishes his supervisor and the Regional Director pretended there were budgetary constraints so as to have his post struck from the programme. By disregarding the Government's wishes the Organization overlooked essential facts.

That it was the WHO that wanted him to go is borne out by its citing as grounds for termination Staff Rule 1040, which is about the completion of temporary appointments and refers to a decision "not to reappoint". The Organization failed to observe the criteria in Rule 1050 - the provision it ought to have relied on - by appointing another applicant, and not one senior to him, to a post in Africa that he had applied for. In making that appointment the Regional Director improperly sought to earn political goodwill by choosing the citizen of an African country.

The Organization has argued that Rule 1050 does not apply to his case because it covers only posts of indefinite duration. Yet nowhere is there any definition of such posts. Besides, the personnel action form referred to completion of "appointment", not to "temporary appointment", and made no mention of Rule 1040.

Lastly, he says that he was not at all to blame for the delay in the appeal proceedings. Had there been word of earlier hearings at headquarters he would have been only too glad.

He seeks the quashing of the impugned decision and reinstatement in a suitable post.

C. The Organization denies that personal prejudice was the reason for ending the complainant's appointment.

As the Tribunal has held, prejudice usually has to be established by inference. Though the complainant cites as evidence of prejudice his supervisor's alleged attempt to have him replaced, the supervisor merely recommended, on the Government's proposal, appointing someone else pending his reassignment and clearance. And although his supervisor may have been too hasty to condemn him, the dislike did not go so far as to amount to personal prejudice; his performance reports were good and he was promoted to grade P.5. Had the dislike amounted to prejudice his supervisor would have recommended replacing him altogether with the other staff member rather than taking on the other as a "stop-gap".

There is not a jot of evidence to suggest hostility on the part of his second supervisor, who considerately extended his appointment and asked the Regional Office to find him alternative assignments. The evidence does show that opinions in government circles were divided about him, but again that does not bear out his charge of prejudice.

The Organization maintains that the final decision on the funding of the complainant's post came from the Government. Although it discusses funding with governments it cannot impose a programme that a country does not want.

Environmental health programmes were scaled down in Uganda after 1988. The complainant's post was to be redefined and transferred to the Health Manpower Development (HMD) programme. The credit allocated for 1988-89 - $248,100 - was heavily reduced - to $88,000 - in 1990-91 and ultimately removed altogether. If the complainant's post had been abolished for the sole purpose of getting rid of him the Government would have asked for the services of another sanitary engineer after his departure. It did not.

Contrary to what the complainant asserts, he is not covered by the criteria in Rule 1050. Paragraph 1 of that rule states that "the temporary appointment of a staff member engaged for a post of limited duration may be terminated prior to its expiration date if the post is abolished", and the reduction-in-force procedure in 1050.2 applies only to indefinite appointments. The complainant's post was one of limited duration as defined in WHO Manual paragraph II.9.260. So it was under Rule 1040 that his appointment terminated, on the expiry of his temporary contract.

By the time the Tribunal delivers judgment the complainant will be only a few months short of the age of retirement. So even if his complaint were allowed his reinstatement would not be a suitable remedy. Moreover any award of damages should take account of his earnings and pension payments since leaving the Organization.

D. In his rejoinder the complainant submits that the transfer of his post as scheduled for 1990-91 would not have affected the continuance of his assignment since he had already worked for the Health Manpower Development programme. The allocation of $248,100 for 1988-89 was ample to fund his post until the end of the biennium; yet the WHO maintained that funding was exhausted by the date of his termination. He concludes that the budget was "manipulated" to show a deficit and additional funds were approved later.

The post he held was one of indefinite duration. Manual paragraph II.9.255 states that "posts of indefinite duration comprise those that continue in existence unless and until an express decision is taken to abolish them". Since his post was abolished the WHO should have applied the reduction-in-force procedure in Rule 1050. Manual paragraph II.9.260 is immaterial since it was not in force at the time of his termination.

That he is near the age of retirement is irrelevant since the Director-General may at discretion grant exceptions.

The WHO is improperly seeking to belittle its liability by suggesting that his pension and earnings be counted in any award of damages.

E. In its surrejoinder the WHO denies changing the funding of the complainant's post in the budget for 1988-89. It properly applied the Staff Rules. Although Manual paragraph II.9.260 came in after the complainant's termination, it confirms the position the Organization has always taken: a post on a country project is not one of indefinite duration within the meaning of 1050.2. Extension of appointment beyond the age of retirement being discretionary, the Director-General may not be ordered to exercise his discretion in the complainant's favour. To take account of earnings and pension in reckoning damages is usual and only reasonable.

CONSIDERATIONS:

1. The complainant joined the staff of the WHO as a sanitary engineer in 1971. He was appointed in 1983, still as a sanitary engineer, to a project in Uganda for the supply and sanitation of community water, known as CWS, which was administered by the WHO's Regional Office for Africa (AFRO), in Brazzaville. He was granted a fixed-term contract for two years from October 1983. He had it extended, by two years, to October 1987 and then in turn to 31 March, 30 June and 30 September 1988. What he is objecting to in his complaint is the decision not to extend it thereafter.

2. By a letter of 5 February 1988 AFRO informed him that funding for his post and contract would expire on 30 June 1988. Although on 7 June he had his contract extended to 30 September he was given notice by a letter of 11 July that he got on 1 August that it would not be extended again but would expire at that date.

3. On 12 November 1988 he appealed to the Regional Board of Appeal against the non-renewal alleging personal prejudice on the part of his supervisor - the WHO's then Representative - of his predecessor and of other officials, contrary to Staff Rule 1230.1.1, incomplete consideration of facts by the Representative and other officials contrary to Rule 1230.1.2, failure to grant him sufficient notice and denial of "priority retention" upon abolition of post, contrary to Rule 1050.2.

4. Only after he had made two complaints to the headquarters Board of Appeal in Geneva of inaction on the part of the Regional Board did the Regional Board hear his appeal, on 4 July 1990. It met for half an hour and then, on 20 July 1990, issued a cursory report recommending rejection. The complainant did not become aware of its report until 24 May 1991, when he received a letter dated 12 March 1991 from the Regional Director accepting the Board's recommendation.

5. On 27 May 1991 he put his case to the headquarters Board pressing his claims on two main grounds, personal prejudice and denial of priority retention. In a comprehensive report of 13 April 1993 the headquarters Board found that officials of the Ugandan Government, AFRO and his supervisors had all agreed that he was a competent and experienced sanitary engineer and had appreciated his services; yet, while giving satisfactory reports on his performance, his supervisors had discredited him in correspondence. The Board found that although the Administration had cited the Ugandan Government's prerogative as the reason for termination the Government did want the services of a sanitary engineer. The evidence gave the Board reason to suspect that it was the WHO that had wanted

to discharge him. The Board concluded that, though there was no "proof" of personal prejudice, it was the likeliest cause of the decision not to extend his contract, and it recommended reinstating him. The Director-General did not agree, however, and by a letter of 1 June 1993 informed the complainant of the rejection of his appeal.

6. This case raises two main questions: whether personal prejudice was the cause of the impugned decision, and whether the post he held was one of "indefinite duration" that was abolished and the "reduction-in-force procedure" was therefore applicable.

The complainant's charge of personal prejudice

7. The Organization submits that it was the Government's prerogative to change the budget of the project and so determine whether or not a post under the project should be extended or not; that the Government did not include the complainant's post when submitting its "country programme" for 1988-89; that the allocation of 248,100 United States dollars for the CWS project for that biennium did not include funds for the complainant's post but made provision only for short-term consultancy services; that only that provision made possible the extension of the complainant's contract up to 30 June 1988; and that the extension up to 30 September 1988 was secured by means of a transfer of funds from another programme; and that the complainant's contract could not therefore be further extended.

8. The Organization gave the complainant satisfactory performance appraisals, and all but one of the government officials directly concerned with his work had made it clear to the Representative between September 1987 and March 1988 that both his post and his services were needed. Indeed a letter written on 26 October 1987 by the Representative to a senior Ugandan official unequivocally records that the question of his continued employment in Uganda had been discussed in the review of the budget for 1988-89 and it had been agreed that his services would be needed for at least one more year.

9. Even after notice of termination had been served on the complainant in February 1988, the Government and the Organization were agreed upon the continuing need both for the post and for the incumbent in 1988 and even beyond. The Representative accordingly wrote to the Regional Director on 14 April 1988 proposing to transfer funds to CWS from a programme for public information and education for health (IEH) to fund the complainant's post, as the Ministry of Health had asked, for the remaining six months of 1988. He suggested that a post for a "public health engineer/teacher" would be more appropriate

and that if funds were available in 1989 such a post should be created under another programme, Health Manpower Development (HMD), on the understanding that the engineer could also render service to the Ministry of Health. There is no evidence to suggest that the Government's views changed at any time thereafter.

10. In reply to the Organization's contention that funds were not available the complainant asserts that the allocation of $248,100 for 1988-89 did cover his post and was not much different from the allocations for previous years, and that after he had left short-term consultants were recruited for the remainder of the biennium. The Organization does not deny any of his assertions, and it seems likely that the consultants did perform the same functions as those the Ministry expected of him.

11. The programme budget for 1990-91 produced by the Organization is in line with what the Representative had proposed in April 1988. It shows an increase of $63,700 for HMD and a reduction of $160,100 in the allocation for CWS, which is explained as follows:

> "... the post of Public Health Engineer ... is not required in the same form. A new post description of Public Health Engineer under HMD Programme is to be decided by Ministry of Health."

12. The conclusion is that the Government wanted not only a post for a sanitary engineer to continue in 1988-89 but also to have the complainant's services in such post even after 30 September 1988, and that funds were or could have been made available without difficulty for the purpose. The Organization has not advanced any other reason for non-renewal. Assuming that the complainant had already been too long in Uganda, the Representative incorrectly told AFRO in May and again in December 1987 that the Government did not want the post or the complainant's services, and the Regional Director refused to extend his contract after 30 September 1988 on the wholly untenable grounds that the Government did not wish to extend the post and that funds were not available. As was held in Judgment 495 (in re Olivares Silva), under 23:

> "In such a case it is enough for the complainant to show that it is more probable than not that a bias against him was a factor in the [decision-maker's] mind when he was considering whether or not the contract should be terminated."

The refusal to extend the complainant's contract on patently untenable grounds makes it "more probable than not" that the decision was actuated by personal prejudice against him. It therefore cannot stand.

The abolition of post

13. Rule 1050.2 prescribes a reduction-in-force procedure when a post of "indefinite duration" is abolished. The WHO contends that the complainant held a fixed-term appointment on a post of limited duration, and it cites Manual paragraph II.9.260, which, as revised on 20 September 1989, reads:

> "Reduction-in-force provisions do not apply to posts of limited duration ... [which] automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include: ...
>
> 260.3 country project posts, irrespective of the source of funds."

But that provision is inapplicable because it was introduced only after the termination of the complainant's appointment. Since the rules do not explain the terms "limited" and "indefinite" duration the definition in Judgment 515 (in re Vargas) holds good:

> "A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration."

14. Here the project was not one of limited duration. First, the WHO has not produced any document which established the complainant's post or prescribed its duration. Moreover, even assuming that it might have begun as a post of limited duration, the several extensions of it show that it had become one of indefinite duration and the complainant was therefore entitled on the abolition of it to have the reduction-in-force procedure applied. A similar case is the one the Tribunal ruled on in Judgment 891 (in re Morris): see under 7.

15. Upon the abolition of the post which the complainant held compliance with the reduction-in-force procedure was a

condition precedent to the termination of his contract. Not being the outcome of a valid procedure, the notice of termination he was given was invalid, and he was entitled to reinstatement for the same reasons as those that are explained in another judgment delivered this day: No. 1371 (in re Ortiz). Having been born on 24 October 1934, however, he is now only a few months short of the normal age of retirement, which is sixty; moreover, he is already being paid a retirement pension. So it is too late to order reinstatement or compliance with the reduction-in-force procedure. The Tribunal will therefore award him instead full compensation equivalent to the salary, allowances and any other benefits that would have been due to him under a contract from 1 October 1988 up to the date at which he attains the normal age of retirement, less any occupational earnings and indemnity he may have received in the meantime.

16. Although the Organization contends that he should give credit for pension payments as well, he points out that his total life-long pension entitlements remain the same, whatever the age of retirement, because the amount in a participant's pension account is fixed and any benefit received on retirement before the age of sixty is offset by subsequent and corresponding reduction. The Tribunal accepts that plea and therefore will not order him to account for pension payments.

17. Since the termination of his appointment was tainted with personal prejudice he has also suffered moral injury and the Tribunal awards him $4,000 in damages on that account. Since he has not asked for costs no award is made under that head.

DECISION:

For the above reasons,

1. The Director-General's decision of 1 June 1993 is quashed.

2. The Organization shall pay the complainant in full the salary, allowances and any other benefits due to him under contract in accordance with what is set out in 15 above.

3. It shall pay him $4,000 in damages for moral injury.

4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas Mella Carroll

William Douglas Mella Carroll Mark Fernando

AB Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

RGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re KRUSE

Judgment 1343

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gerhard Kruse against the European Patent Organisation (EPO) on 15 October 1993 and corrected on 4 November 1993, the EPO's reply of 28 January 1994, the complainant's rejoinder of 6 March and the Organisation's surrejoinder of 12 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 12 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to grant the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German who was born in 1935, joined the staff of the EPO in 1980 at grade A2/A3 as head of the Library and Public Information Department in Directorate-General 4 (DG4) in Munich. In 1986 he got promotion to grade A4. On 1 January 1990 the Department was transferred from DG4 to a new Principal Directorate for Patent Information (PD 0.4).

In July 1991 the Consultancy Services of the British Library submitted to the President of the European Patent Office a study he had commissioned from them on the library and information services. The study, known as the Hill report, recommended that the Office's public information service should remain a part of PD 0.4, which was to be transferred to Vienna, putting its central library service under Directorate-General 2 (DG2), in Munich, and having a category B staff member run it.

The Administration invited the complainant to comment and he did so in September 1991. At meetings from 25 to 27 November a Presidential Committee decided to bring in the proposed changes as from 1 January 1992 but left it undecided whether an official in category A or B should manage the library.

On 13 February 1992 the President and other senior officers discussed with the complainant putting him on a post as head of the Library Research Service in Munich.

On 16 March the Principal Director of Finance revoked the complainant's authority to sign payment orders on the grounds that he had been "transferred".

By an electronic mail message of 20 March a personnel officer told him that his supervisor had named someone else to take over as reporting officer for library staff as from 1990-91.

In another such message of 20 March he asked the Director of Personnel for formal notice of transfer. By a letter of 31 March 1992 the Director told him that in keeping with the President's decision to reorganise PD 0.4 as from 1 January 1992 he had been transferred to PD 2.0 in DG2 under the supervision of the Principal Director of Professional and Administrative Support as head of the Library Research Service, still at grade A4.

On 27 April 1992 he filed an appeal against the transfer. The Director of Personnel informed him in a letter of 6 May 1992 that the President had referred the matter to the Appeals Committee.

In its report of 15 June 1993 the Committee recommended rejecting his claim to reinstatement in his former post but compensating him for moral injury.

By a letter dated 2 August 1993, which he impugns, the Vice-President informed him of the President's rejection of his appeal.

B. The complainant submits that the transfer was unlawful. Although such action is at its discretion the EPO owes staff a duty of care which in his case it failed to discharge. He derives an acquired right to his post as head of the library from the mention of that post in his letter of appointment. By making him end his career with "dubious consultancy work and other subordinate tasks" the EPO has impaired his professional reputation and undermined his health.

Even if transfer was unavoidable the EPO owed him at least a new post at the same level as his original one. Instead it stripped him retroactively of his responsibilities as reporting officer and gave him new and far lower duties. What is more, it withheld approval of his official missions and so kept him from carrying them out. It left him idle.

It failed to give him in good time the reasons for transfer. His supervisor, who could have explained them, made a mockery of the internal hearings by not turning up. That was in breach of his right to a fair hearing.

He wants the Tribunal to set the impugned decision aside; have him reinstated in his former post or, failing that, put on one of "similar standing"; order the EPO to "restore" his reputation both within and outside the Office; and award him costs.

C. The EPO submits in reply that the decision under challenge shows no fatal flaws: any damage he may have suffered was either of his own making or no worse than such as any official may expect in the ordinary course of his career.

Under Article 12 of the Service Regulations the assignment of a staff member is at the appointing authority's discretion. The Tribunal has consistently held that staff members have no acquired right to any particular post. Barring damage to some fundamental interest they must just put up with any inconvenience that reforms may cause.

Before carrying out reforms of the library the EPO consulted the complainant on the Hill report. Having discussed his case with the President in February 1992, he is wrong to allege that the Administration failed to state its reasons for reassigning him.

His new duties were not of lesser value: he merely gave up management duties that were at B category level so that he could concentrate on library work. The reason why he did not achieve more in his new job was his own distaste for the change, not an attempt by the Organisation to keep him idle; and his poor health and lack of initiative did not help. As for his missions, a shortage of funds called for thrift.

His new post struck a balance between the Organisation's needs and his wish to stay in his chosen field without moving to Vienna. Any harm to his reputation was due to his own disparaging comments about his new duties.

D. In his rejoinder the complainant seeks to set the record straight on several issues of fact and to answer the pleas in the reply. He denies saying he wanted to stay in Munich: had the EPO offered him an acceptable post in Vienna he would have taken it. Before suddenly losing his duties he was never unwell. To any impartial observer what the EPO did to him looked like covert disciplinary action.

E. In its surrejoinder the EPO observes that there is nothing in the complainant's rejoinder to alter its view of his case. If he was willing to go to Vienna why did he not apply for a recent vacancy there that would have suited him to a T? There being nothing about the reassignment that could have damaged his health, it was his own attitude that was to blame. Though he may not have liked the reassignment it was not disciplinary action.

CONSIDERATIONS:

1. The complainant joined the EPO on 1 February 1980 at its office in Munich at grade A2/A3. He was head of the Library and Public Information Department, which belonged to Directorate-General 4. He was promoted to grade A4 in the same post as from 1 August 1986.

2. On 1 January 1990 the Department was transferred to a new Principal Directorate for Patent Information.

3. In 1991 the President of the European Patent Office commissioned from the Consultancy Services of the British Library a study of the EPO's library and information services. The terms of reference covered review of the organisation and management of those services and ways of improving them for the EPO's own staff and for other users. The report that the Consultancy Services made is dated July 1991 and has come to be known as the Hill report after the principal consultant.

4. The Hill report found that, unlike the Central Library Service at the EPO's office at The Hague, the library in Munich did not enjoy the confidence of management or patent examiners. There were, it said, weaknesses in the management of the Munich library at all levels, ineffective methods of budget and administrative control, a lack of incentives, a serious failure to ensure that the skills of the staff were kept up-to-date and poor communication between the two main libraries. The report recommended separating responsibility for the library itself and its various services. Thus the library became part of Directorate-General 2, in Munich, and after the takeover by the EPO of the International Patent Documentation Centre in Vienna the information services formerly provided in Munich were transferred to Vienna.

5. The complainant submitted written comments on the report in September 1991. On 30 January 1992 the President held a meeting on the subject with him and other senior officials. At a further meeting on 13 February 1992 the President gave him a draft job description for the post of head of a new Library Research Service, according to which his principal functions would be to advise the chairman of the Library Co-ordination Committee on options for the development of library and bibliographical services. By a letter of 31 March 1992 the Director of Personnel told the complainant that he was reassigned as from 1 January 1992 as head of the Library Research Service.

6. On 27 April 1992 he filed an internal appeal seeking reinstatement in his old post as head of the library as defined in the description he had been given on appointment in 1980. He contended that he had had no explanation of his reassignment and that the reduction in responsibility was damaging to his reputation. In its report of 15 June 1993 the Appeals Committee, to which his case had been referred, recommended rejecting his claim to reinstatement but awarding him compensation for moral injury by reason of certain actions and omissions by the Organisation before 31 March 1992. But on 2 August 1993 the President of the Office rejected all his claims and that is the decision he is now impugning.

7. Article 12 of the EPO Service Regulations reads:

"(1) The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign each permanent employee to the specific post for which he has been appointed.

(2) A permanent employee may be transferred within the Office either on the initiative of the appointing authority or at his own request to a vacant post which corresponds to his grade. ..."

Article 12 thus confers on the President of the Office as the "appointing authority" discretion in assigning and reassigning staff. His exercise of that discretion is subject only to limited review by the Tribunal, which will not interfere with the decision unless it shows a mistake of law or of fact or some other fatal flaw.

8. The complainant does not dispute that reforms in organisation are at the President's discretion. What he contends is that the decision he is challenging was based on criteria which were not objective and that the President disregarded the damage that such "sudden" reforms would do to his reputation; that he was denied his right to a hearing;

that his new job is not commensurate with his grade and his former post; and that the President has acted in breach of good faith.

9. The Hill report leaves no doubt but that the reorganisation of the library and public information services was in the Organisation's interests. The complainant's comments on the report were obtained, and he had meetings with the President and senior officials about the consequences of acting on the recommendations in the report. He was informed on 13 February 1992 of his proposed transfer as head of the Library Research Service and was given a draft description of the post. Although his duties are mainly advisory there is no reason to suppose that he cannot make use in the new post of his unquestioned knowledge and experience. Whether the post is "commensurate" with his former post and grade depends on an objective test, namely the level of his duties. He has failed to satisfy the Tribunal that their level is not in keeping with his grade, which was the same after as before transfer. The essential difference was that he had been relieved of purely administrative tasks of day-to-day management that carried a lower grade anyway.

10. Though the details of the complainant's new post were not settled until 31 March 1992, the reforms were made retroactive to 1 January 1992. By notes of 6 and 16 March 1992 his name was removed from the list of officials authorised to sign payment orders and to give other administrative instructions. It is true that those notes were premature and should not have taken effect until he had been formally transferred. But because they were the inevitable consequences of the changes that were being discussed in February 1992 he cannot be said to have suffered any moral injury. In any event he claims no award of damages under that head.

11. Mr. Gérard Giroud was responsible for writing the complainant's staff report for 1990-91, which was overdue. Mr. Giroud's failure to appear before the Appeals Committee prompted adverse comment from the Committee. With the Committee's consent its chairman put questions to him in writing on 25 January 1993 and he answered in writing on 16 February, but the Committee found his answers unsatisfactory. A further hearing in the presence of Mr. Giroud was agreed upon, but again he failed to attend.

12. The delay in the filing of a staff report on the complainant for 1990-91 in the context of the reorganisation recommended by the Hill report affords no grounds for any award of damages; nor can Mr. Giroud's failure to give satisfactory

evidence to the Appeals Committee, deplorable though it be, have had any effect on the outcome of the issues raised in this complaint.

13. The Organisation assumed that the complainant did not wish to move to Vienna. He states that he was not offered any position there but that if he had been offered an acceptable one he would have taken it. But that is a matter which he might have raised with the President of the Office, and the evidence does not reveal that he ever did so.

14. The conclusion is that the Organisation treated him fairly over his reassignment and that none of his objections is sound.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
P. Pescatore
Mark Fernando

A.B. Gardner

International Labour Organisation
Administrative Tribunal
Geneva

GANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re ANGIUS (No. 2) — Judgment 1344

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Piero Angius against the European Patent Organisation (EPO) on 6 October 1993 and corrected on 14 October 1993, the EPO's reply of 3 January 1994, the complainant's rejoinder of 7 March and the Organisation's surrejoinder of 2 May 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 24 and 106 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 24 of the Service Regulations of the EPO reads:

> "(1) A permanent employee shall be responsible for the discharge of the duties entrusted to him. The responsibilities of his subordinates shall in no way diminish the responsibilities devolving on him.
>
> (2) Should an order received by a permanent employee appear to him irregular, or should its execution seem to him likely to have undesirable consequences of a serious nature, he shall convey his opinion to his immediate superior, in writing if necessary. If the latter confirms the order in writing the employee shall carry it out, unless its execution would constitute an act contrary to the criminal law in force in the country of which the employee is a national or in the country in which the order is to be executed."

The complainant, an Italian born in 1948, has been on the staff of the EPO since 1980 and is a search examiner in Directorate-General 1 (DG1) at The Hague. He holds grade A3.

In notes of 8 February and 11 March 1991 to the Principal Director of Search he objected to his director's "negative attitude" towards his work. By a letter of 12 March 1991 the Principal Director replied that one duty of his director was "maintaining control over search quality" and advised him to substantiate the serious allegations he had made.

In a note of 20 August 1991 to the Principal Director the complainant objected to his director's amending without his approval a search report that bore his signature. In a note of 5 September to the Principal Director he raised similar objections about another report. In a later undated note he told the Principal Director that his director was putting him under pressure and he asked for help in ending the "persecution".

Having been assigned to another directorate in Search, he asked in a letter of 22 October 1991 to see the Principal Director and accused his former director of "forgery" and "spreading offensive remarks" about him.

On 14 September 1992 he submitted a request under Article 106 of the Service Regulations that the President order an inquiry into the searches that his former director had amended and any effect they might have had on his career; restore them to their original form or, failing that, publish them in someone else's name; and compensate him for "punitive measures". In the event of refusal he wanted his letter to be treated as an internal appeal.

The President referred his appeal to the internal Appeals Committee on 14 October 1992. In a note of 3 September 1993 the complainant informed the chairman of the Committee that unless he received the Administration's brief within three weeks he would go directly to the Tribunal. He is impugning the inferred rejection of his claims of 14 September 1992.

B. The complainant submits that by tampering with his search reports and publishing them in his name the EPO is in breach of the national legislation of its member States and Article 24 of the Service Regulations.

A full year after filing his appeal he was still waiting for a final decision, and such delay is just not acceptable.

The Administration altered reports he was responsible for and then failed to carry out a proper enquiry into the matter. It has dashed his prospects of promotion and disrupted his professional and private life. He claims material and moral damages in an amount not less than one million German marks.

C. In its reply the EPO contends that the complaint is irreceivable. The complainant failed to exhaust the internal remedies available to him. He is wrong to suggest that the internal procedure was taking too long: the Committee had other cases before it - among them some of general interest - and the complainant had to await his turn. Besides, it was reasonable to take his appeal along with a closely related one he filed on 25 October 1993. In any event it was time-barred: although he knew by August 1991 that the EPO had published in his name an amended search report of his he waited until 14 September 1992 to appeal.

In subsidiary argument the EPO submits that his complaint is devoid of merit. As the Principal Director informed him in March 1991 directors have a duty to keep up high standards in their directorates. Although the complainant seems to think he is infallible, others have found flaws in his work. His attitude hampered his supervisors' efforts to take them up with him in the short time available between submission and publication of a report.

He does not try to show that the amendments to his reports were mistaken. Nor does he produce any evidence of damage to his professional standing or private life, apart from wounds to his self-esteem. Indeed he should be grateful to his director for ensuring that his published reports were accurate.

D. In his rejoinder the complainant argues that his complaint is receivable. Falsification of search reports is a matter of "general interest" to examiners and the delay in settling his case is making his life at the EPO more difficult. Not until September 1992 did he learn that the Principal Director was behind his troubles and he lodged his appeal forthwith.

His staff report for 1988-89 showed that the quality of his work was "very good". After that his differences with the Principal Director caused his work to be described as "unsatisfactory". The material issue is not whether he is "infallible" but whether the changes to his search reports were warranted. Other examiners say they were not. The fact that the Administration has not amended any of them since August 1991 is proof that they are accurate.

The Administration has done irremediable injury to his career prospects and further humiliated him by giving him a tutor. The stress he is under has damaged his health.

E. In its surrejoinder the EPO says the rejoinder contains no new arguments to cause a change in its position. On receivability it points out that it told him on 17 January 1994 that the Appeals Committee would take up, on 23 February, four related appeals he had lodged including the one whose outcome he forestalled by going to the Tribunal. The premature filing of his complaint kept the Committee from gathering all the information it needed.

According to their job descriptions the directors are responsible for monitoring and correcting search reports. Whenever possible they consult the examiner about any changes. The many insults and unsubstantiated allegations in the complainant's rejoinder are "typical" of his attitude.

CONSIDERATIONS:

1. The complainant joined the staff of the European Patent Organisation in January 1980. He is a search examiner of patents at grade A3 and is stationed at the Organisation's office at The Hague. Reports appraising his performance up to 1989 described it as "very good".

2. Search examiners are required to write what are known as "search reports". In August 1991 the complainant became aware that a report of his had been changed without his knowledge. On 20 August he protested in writing to the Principal Director of Search. After correspondence he wrote a letter on 14 September 1992 to the President of the European Patent Office alleging various forms of discriminatory and "punitive" treatment by his supervisors, applying, among other things, for a formal inquiry and saying that, if his application was refused, his letter was to be treated as lodging an internal appeal. The President referred his case to the Appeals Committee.

3. By a letter of 21 October 1992 the chairman of the Appeals Committee acknowledged receipt of his appeal and told him that it would be "dealt with as soon as possible, bearing in mind the Committee's caseload and meetings timetable", that the Administration would need to prepare a dossier on the case and write a brief and that "the next suitable meeting in The Hague" was provisionally scheduled for May 1993.

4. The EPO took no action, however, and by a letter of 3 September 1993 the complainant informed the chairman of the Committee that he found the delay "totally unacceptable" and that if he did not get the Administration's brief within three weeks he would go to the Tribunal. On 6 October 1993 he did so.

Receivability

5. The Organisation pleads first that the complaint is irreceivable because he filed his internal appeal out of time and so has failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. It contends that he knew by August 1991 at the latest that an altered search report had been published in his name and it was up to him then to file an internal appeal.

6. The Organisation's argument fails. Amendment of the complainant's search reports was only one feature of the alleged continuing unfair treatment which formed the subject of his internal appeal, other examples he gave being the assignment of another examiner who had no experience in his own technical field to repeat his searches so as to prove him wrong and impair his reputation; systematic misuse of his signature; requiring him to work with a tutor; and treating him in various discriminatory ways.

7. The EPO pleads, secondly, that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because in any event he ought to have awaited the outcome of his internal appeal. It observes that the Committee takes up appeals not just in the chronological order of filing but also with regard to the importance of the issues they raise.

8. That plea too fails. The complainant's appeal did raise important issues. A primary purpose of the Service Regulations is to establish and maintain good staff relations and the investigation of charges of discriminatory and punitive treatment of a staff member is a responsibility that the Organisation assumes under those Regulations.

9. The further suggestion by the Organisation that there was a wish to take up the complainant's internal appeal at the same time as a later appeal of his - No. 62/93 - is unconvincing. Since the later appeal was about his staff report for 1990 the two appeals showed different causes of action. Besides, the EPO never communicated to the complainant himself any suggestion that they were to be taken together.

10. The complainant filed his first internal appeal on 14 September 1992. By 3 September 1993 the EPO had not let him have its brief in reply nor even given him any inkling as to when it was likely to do so.

11. It is true that Article VII(1) of the Statute provides that a complaint will not be receivable unless the complainant has exhausted such other means of resisting the decision as are open to him under the applicable staff regulations. But it is plain from the case law that the

Tribunal construes that article to mean that when a complainant has done all that is required of him to get a final decision, yet the proceedings appear unlikely to be concluded within a reasonable time, he may appeal directly to the Tribunal: see Judgments 451 (in re Dobosch) and 499 (in re Tarrab No.9).

12. The conclusion is that in the circumstances of this case the complaint must be declared receivable.

The merits

13. In his internal appeal the complainant alleged the following "punitive" measures against him:

(a) the amending of his search reports without consultation;

(b) having his searches done over again in order to find mistakes without affording him an opportunity to defend his work;

(c) publishing the amended reports as if they had come from him; and

(d) treating him in various discriminatory ways.

14. As to the amendment of the reports the Organisation contends that the Principal Director of Search has a duty to ensure that the search standards set in general directives are duly applied. But the complainant is not challenging his supervisors' right to correct any mistakes there may be in his reports. What he says is that he should be consulted about them. The EPO gives pressure of time as a reason for not consulting him: the reports must, it argues, be published as soon as possible after the expiry of eighteen months from the date of filing of the application for a patent, or earlier, if the applicant so asks. The Organisation observes that the complainant was unwilling to co-operate or send in reports before going on holiday. The complainant denies that.

15. Whatever the truth of the matter may be, even if the EPO was short of time it was not justified in changing his reports, in not even discussing the changes with him afterwards nor giving him an opportunity to comment on any amendments, and in publishing them under his name.

16. As to the quality of his work, the Principal Director - anticipating, as he says, the complainant's request for an inquiry - asked the Directorate of Harmonisation and Quality on 27 March 1992 to carry out a study of the quality of the complainant's search examinations in the period from 1 January

to 31 December 1990. The resulting study is dated 25 May 1992. But even before that date the complainant was informed that he would have to work under a tutor. It cannot therefore be properly said - as the Organisation makes out in its letter of 17 September 1993 - that it was found advisable on the strength of the findings of the study to require him to work with a tutor. On this point the Organisation states in its surrejoinder that the outcome of the study disclosed no reason to suspend the requirement.

17. The Principal Director asked that a copy of the study should be supplied to the complainant; the complainant says that it was not. If the true purpose of the study was to improve the quality of his work his supervisors had a duty to discuss the findings with him, let him comment and suggest measures for improving the quality of his work. There is no evidence before the Tribunal to suggest that that was ever done. What is clear is that none of his search reports has been amended since he protested to amendment of reports he had done in 1991.

18. The Tribunal is satisfied that the action taken by the complainant's supervisors - ordering the study and requiring him to work with a tutor - was actuated by a desire, not to improve the quality of his work, but to punish him for challenging the amendment of his reports without consulting him.

19. By failing to ensure that the complainant's appeal was dealt with in reasonable time the Organisation is at fault. By failing to act in relation to the manner in which his search reports were amended and in treating him as described above it has further acted in breach of his right to fair treatment. He is entitled to an award of damages for moral injury on that account and the Tribunal sets the amount at 6,000 German marks. But his claim to material damages fails because he fails to show material injury.

DECISION:

For the above reasons.

1. The Organisation shall pay the complainant 6,000 German marks in damages for moral injury.
2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

GANISATION INTERNATIONALE DU TRAVAIL   INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF   *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

Judgment 1345

In re FARNESE (No. 3)

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Giuseppe Pasquale Farnese against the European Patent Organisation (EPO) on 16 September 1993 and corrected on 20 October 1993, the EPO's reply of 13 January 1994, the complainant's rejoinder of 1 March and the Organisation's surrejoinder of 12 April 1994;

Considering Articles II, paragraphs 5 and 6, and VII, paragraphs 1 and 2, of the Statute of the Tribunal and Articles 62, 89, 91 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian born in 1951, was employed by the EPO as a search examiner from 7 January 1980 to 1 April 1991, when an Invalidity Committee decided he should get an invalidity pension.

The Committee consisted of the Organisation's medical officer at its sub-office in Berlin, Dr. Havestadt; the complainant's doctor, Dr. Oliviero; and a third member, Dr. Greve, appointed by agreement between the other two. The Committee told the complainant to report for medical examinations in Berlin, then his duty station, on 7 March 1991. It said it would take up his case on 8 March 1991 and that the proceedings would be in German.

In a letter of 4 March 1991 the Committee's secretary told the complainant what the arrangements were and warned him that in accordance with Article 91(2) of the Service Regulations he would have to bear any fees his doctor's interpreter might charge.

Article 91(2) reads:

> "Where the medical practitioner appointed by the permanent employee is resident elsewhere than at the latter's place of employment, the employee concerned shall bear the cost of additional fees and additional expenses entailed."

On 7 March Dr. Havestadt and Dr. Greve examined the complainant in turn. The complainant's doctor and an interpreter were with him.

In a letter of 31 May to the secretary of the Committee he claimed the refund of Dr. Oliviero's and the interpreter's fees, of airline tickets for Dr. Oliviero and himself and of the cost of his hotel for 6 March.

Replying on 27 June the head of the Berlin sub-office asked him for Dr. Oliviero's account number and explained why he would have to bear the interpreter's fees himself. The EPO settled Dr. Oliviero's fees on 16 September 1991.

In a letter dated 23 September to the head of the sub-office the complainant claimed payment of Dr. Oliviero's fees for his part in the examinations of 7 March; of the interpreter's fees for services rendered on 7 and 8 March; of travel expenses and the cost of hotel accommodation on 6 March for Dr. Oliviero and himself; of travel expenses he incurred for the medical examination he had at The Hague on 11 July 1990; and of interest on the amounts due. He asked the head of the sub-office in the event of rejection to treat his letter as an internal appeal under Article 108 of the Service Regulations.

In a letter of 28 January 1992 the head of the sub-office told the complainant (1) that the Administration had paid Dr. Oliviero on 16 September 1991 for his work on the Committee; (2) that since the procedure did not require attendance by his doctor or an interpreter at the examinations of 7 March the EPO was not liable for their fees; (3) that he would get the refund of his travel and hotel costs upon production of the original invoices; (4) that Dr. Oliviero's travel and hotel expenses for 7 March only would be refunded upon production of the bills; (5) that there was no evidence to suggest that he could not have travelled alone and therefore no reason why the EPO should pay Dr. Oliviero's hotel expenses for 6 March; (6) that since the Organisation had rejected his claim to travel expenses for examination at The Hague on 11 July 1990 he had to await the outcome of the appeal procedure; and (7) that no interest was due.

Despite a reminder from the EPO on 5 August 1992 the complainant did not reply until 24 August, when he pressed his claims.

In a report of 3 May 1993 the Appeals Committee recommended rejecting his appeal. In a letter of 16 June 1993 the Director of Staff Policy told him that the President of the Office had endorsed the Committee's recommendation and rejected his appeal. That is the decision he now impugns.

B. The complainant puts forward the following arguments.

He recalls that on 1 November 1990 the EPO transferred him to Berlin while he was on sick leave. The "fake" medical examination he had to put up with in Rome on 28 September 1990 made him loath to undergo any further examinations the EPO might order unless his own doctor was with him. The secretary of the Invalidity Committee agreed and that was how his doctor came to accompany him to Berlin.

The Invalidity Committee met on 8 March 1991 to decide on the strength of the examinations carried out the day before, which formed part of the procedure. So it was indispensable for his doctor to attend on 7 March. Inasmuch as he knew no German and the two other doctors neither English nor French there had to be the Italian interpreter present.

He seeks the quashing of the decision of 16 June 1993 and subsidiarily an acknowledgment that the services of his doctor and the interpreter were necessary; payment of (1) his doctor's fees for 7 March 1991; (2) the interpreter's fees; (3) travel expenses he and his doctor incurred; (4) their hotel bills for the night of 6 March 1991; (5) travel expenses he incurred to report for medical examination at The Hague on 11 July 1990; and (6) interest on the sums due. He also claims an award of costs.

C. In its reply the EPO submits that the complaint is in part irreceivable and devoid of merit and for the rest devoid of merit.

Not until 23 September 1991 did he duly appeal for the purpose of pressing his claim to the refund of the costs of travel to The Hague for the examination on 11 July 1990, after expiry of the three-month time limit. So that claim is irreceivable.

On the following issues the complaint is devoid of merit:

(1) The Administration refunded his travel and hotel expenses by cheques dated 30 January 1992 but he sent them back without a word of explanation on 18 March 1993.

(2) Dr. Oliviero's fees for attending the Invalidity Committee's meeting were settled on 16 September 1991. The EPO will not refund his fee for his attendance at the examinations on 7 March since it was quite pointless. It is willing to pay his hotel bill for 7 March. The complainant has never proved that he was unable to travel alone.

(3) As to the interpreter's fee the EPO takes the view that the examinations of 7 March did not require his presence and accordingly refuses to meet the fees relating thereto. It is still waiting for the complainant to produce a proper invoice for the fees relating to 8 March.

(4) His claim to interest must also fail since the EPO has either already refunded the amounts due or promised to do so as soon as he supplies proof of payment. He has only himself to blame for the delays he objects to.

D. In his rejoinder the complainant maintains that his claim to the refund of expenses for the medical examination of 11 July 1990 is receivable: the Tribunal has often acknowledged that time limits may be extended in the interest of fairness and in exceptional circumstances. It was because of improprieties he endured while still with the EPO that he refused any further medical examinations it ordered unless his own doctor was also present.

He points out that he had the two medical examinations on 7 March, not, as the EPO makes out, one on 7 March and another the next day.

He says he returned the two cheques because he did not see why he should have to break down his claims and because he wanted his case to be treated as a whole. His own inadequate grasp of German entitled him to have an interpreter attending the examinations.

He has not put in claims to the costs of board, taxis and travel from Naples to Rome and back; they come to about 2,000 German marks and he incurred them at a time when the EPO had suspended his pay.

Since Dr. Oliviero has accepted the amount already refunded he withdraws his claim to payment of Dr. Oliviero's actual fees. He says he would waive his claim to the fees of Dr. Oliviero's interpreter and to the cost of his own travel to The Hague if the EPO would agree to pay those amounts to the families of two staff members who died on its premises at The Hague in 1993. His own right to have an interpreter warrants his earlier claim to the refund of the fees of his doctor's interpreter.

E. In its surrejoinder the EPO acknowledges its mistake over the date of the two examinations, which did indeed both take place on 7 March. It observes that the complainant was required to submit his claims to refund in time and with supporting documents; that the families of the other staff members who died at The Hague are getting the pensions due, over and above the lump sums the Service Regulations prescribe; that the EPO is willing to refund Dr. Oliviero's hotel expenses for 7 March on production of an original invoice for a single room, the bill he submitted being for two nights for both him and his wife. His claim to payment of fees for interpreter's services which he allegedly required for the examinations is a new one and is therefore irreceivable.

CONSIDERATIONS:

1. The complainant, who used to be a permanent employee of the European Patent Organisation, was pensioned off at 1 April 1991 on the grounds of invalidity. He is in dispute with the Organisation over the breakdown of the costs of the "invalidity procedure".

2. He duly followed the internal appeal procedure, and the outcome was a report of 3 May 1993 by the Appeals Committee. On the strength of detailed review of the various material issues the Committee unanimously recommended rejecting his claims. On 16 May 1993 the Director of Staff Policy notified rejection to him on behalf of the President of the Office, and that is the final decision he is impugning.

3. The material facts are the following. By the end of 1990 the sick leave granted to the complainant had reached the maximum number of days allowed under Article 62 of the Service Regulations. The EPO thereupon started the procedure for pensioning him off and set up the Invalidity Committee prescribed in Article 89 of the Regulations. Its own appointee was Dr. Havestadt, the medical officer of its sub-office in Berlin, where the complainant was stationed at the material time. He had taken his sick leave in Italy and he appointed his own doctor, Dr. Oliviero. The EPO nominated Dr. Greve of Berlin as the third member and the first two agreed.

4. The Committee having thus been set up, the complainant was summoned to Berlin to undergo medical examination by Dr. Havestadt and Dr. Greve on 7 and 8 March 1991. The Committee was scheduled to meet on 8 March.

5. The complainant turned up in Berlin on 7 March 1991 with Dr. Oliviero and an interpreter, both of whom attended the

preliminary and separate medical examinations by Dr. Havestadt and Dr. Greve. The interpreter was also with Dr. Oliviero at the Committee's meeting on 8 March.

6. The evidence shows that the EPO has made no difficulty over meeting the complainant's own travel and subsistence expenses, his own doctor's expenses and fees for attending the Committee's meeting and the interpreter's fees for the same purpose. But it is refusing to pay the doctor's and the interpreter's expenses and fees for attending the prior medical examinations. Those are the only sums at issue.

7. The complainant has appended to his complaint a further claim to the travel expenses he incurred, before the invalidity procedure had started, for the purpose of going to The Hague for a medical examination on 11 July 1990. He made that claim on 28 June 1990 and the EPO has never acted on it. Although he lodged an internal appeal on 23 September 1991, that, as the Organisation rightly points out, was after expiry of the time limit for such appeal. Since the EPO had taken no decision on his claim the time limit had expired by 28 November 1990. His complaint is therefore irreceivable in respect of that claim under Article VII(1) of the Tribunal's Statute because he has failed to follow the internal appeal procedure properly.

8. Article 91 of the Service Regulations is the rule that is relevant to dispute over the refund of expenses and fees incurred in the invalidity procedure. It reads:

> "(1) The costs of meetings of the Invalidity Committee shall be borne by the Organisation.
>
> (2) Where the medical practitioner appointed by the permanent employee is resident elsewhere than at the latter's place of employment, the employee concerned shall bear the cost of additional fees and additional expenses entailed."

9. So there are two conditions for the refund of expenses. One is that they have some necessary connection with the Committee's meetings, and the other is that they should have been incurred at the "place of employment", the permanent employee being required to bear any additional fees and expenses he incurs by appointing a doctor from elsewhere.

10. The complainant's claim to sums over and above what the EPO has agreed or offered to pay does not meet either condition. Although the prior examinations by Dr. Havestadt and Dr. Greve had a direct and necessary connection with the Committee's work and required that the complainant attend,

there was no medical reason why for that purpose he should bring along his own doctor or on that account an interpreter. Since he incurred the expenses on his own initiative and in his own interest he must bear them himself. It is not even necessary to rely on Article 91(2).

11. The complaint therefore fails in its entirety. The claim to the expenses of medical examination at The Hague is irreceivable and the claims to certain expenses relating to the Invalidity Committee's work in Berlin are devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re DEMONET

Judgment 1346

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jacques Denis Demonet against the International Criminal Police Organization (Interpol) on 9 April 1993 and corrected on 12 May, Interpol's reply of 9 August, the complainant's rejoinder of 29 October 1993 and the Organization's surrejoinder of 24 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 6, 73(4), 74, 76, 112, 116(1) and 117(4) of the Staff Rules and Article 40(b) of the Staff Regulations of Interpol;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1955, joined Interpol in November 1989 as a "system programmer" at grade C6 in the Electronic Data Processing (EDP) Section of the Support Division (Division IV). One of his duties was to set up and operate IBM, Digital and Wang systems. He had special working hours, from 11 a.m. to 7.15 p.m.

In March 1992 he was given a new task: he was to transfer data on a magnetic tape from an IBM to a Wang system which was being installed. He refused, and a senior colleague so informed the head of the EDP Section in a memorandum of 12 March 1992.

On 17 March the head of the EDP Section sent a memorandum to the head of Division IV and to all his section staff explaining the allotment of work and stating that the complainant was responsible for the transfer of data. The complainant told the head of section that he disagreed and on 19 March, at a meeting with the head of Division IV and the head of section, again refused to do the work.

Since the complainant held to his refusal, the head of Division IV recommended in a memorandum of 20 March 1992 that the Secretary General suspend him from duty and start disciplinary proceedings against him. On the same day the Secretary General conveyed to the complainant a decision to suspend him from duty with pay and put his case to the Joint Disciplinary Committee.

The Committee was informed of the matter by a "statement of charges" that its chairman forwarded to the complainant in a letter of 2 April 1992. The charges were, first, that he had committed a "professional fault" by leaving work at 8 p.m. on 25 October 1991 without warning his supervisors and before completing a "back-up operation" that went wrong after he had gone; secondly, that his act of gross insubordination on 19 March 1992 had amounted to "disciplinary fault" within the meaning of Article 40(b) of the Staff Regulations.

In its report of 24 June 1992 the Committee recommended that the Secretary General drop the charge of professional fault on 25 October 1991 but punish his repeated insubordination by dismissing him, albeit with notice and payment of termination indemnity. The Secretary General endorsed the recommendation and so informed the complainant in a decision of 2 July 1992 that also relieved him of working during the three months' period of notice and granted him salary until termination took effect, on 5 October 1992. On that date he received his terminal entitlements. By a letter of 24 July he applied for review.

In its report of 28 December 1992 the Joint Appeals Committee held unanimously that his wilful and repeated refusal to perform a task that fell within his duties had been in breach of Article 6(1) of the Staff Rules: "officials in command of departments shall maintain discipline within those departments" and "their subordinates shall respect that discipline". The majority further held that he had committed serious misconduct and that the sanction was in proportion.

On the strength of that opinion the Secretary General rejected the complainant's application by a decision of 12 January 1993, and that is the decision under challenge.

B. The complainant first submits that the disciplinary procedure was flawed on the grounds that the Organization denied him the right to a hearing: only on 2 April did he learn of the head of Division's memorandum of 20 March 1992 to the Secretary General, and so he was unable to challenge it. Since it was on that memorandum that the Secretary General based his decision, there was breach of Article 6(2) of the Staff Rules.

Secondly, he denies any fault within the meaning of Article 6 and sees evidence of the Administration's bias in its rejection, in January 1992, of his application for a post as operations analyst at grade 5. He submits that the selection process was not impartial and asks for the curricula vitae of the other applicants to be produced together with his individual file and other missing evidence. He contends that the Organization brought up the incident of 25 October 1991 just to "inflate" the one of March 1992, which on its own did not warrant suspension and came about because the head of section had changed his work so radically that it was more like the lower job of an operations technician than a programmer's. As the descriptions show, the two jobs greatly differ. Though appointed as a programmer, over the months he was steadily downgraded. In fact his post disappeared, as is plain from there being no longer any programmers at Interpol.

Thirdly, he submits that the sanction was disproportionate to the offence. Refusal to carry out an additional task is not serious misconduct and the punishment goes beyond what Articles 116(1) and 117(4) of the Staff Rules prescribe.

Lastly, he provides a statement of the total overtime he worked and submits that the Organization did not fully compensate him for it or apply the rate in Article 73(4) of the Rules.

He asks the Tribunal to quash the decision of 20 March 1992; order the Organization to pay him in full the salary he would have received had he not been suspended, plus pay for overtime but less the termination indemnity and his 23 days' paid leave, and to pay its contribution as employer to the social security funds; award him damages for the moral and professional injury caused by his dismissal and costs.

C. The Organization replies that the complaint is devoid of merit. First, it submits that he may not rely on Article 6 of the Rules, the very rule he infringed, which says that though subordinates may comment on instructions they must nonetheless comply.

The Organization did respect his right to a hearing, both before and after the disciplinary proceedings began. That is plain from the interviews he had with his supervisors in March 1992; from the letter the chairman of the Joint Disciplinary Committee wrote to him on 2 April asking for comments on the "statement of charges"; from his own memoranda to the Joint Disciplinary and Appeals Committees; and from the records of the hearings.

What he says about the job descriptions is irrelevant. He may not rely on the description of the post of operations technician since it was written after the material time. In any case it would not have altered his situation since he would have kept his job as programmer had he stayed on in the Organization. Besides, the two jobs do not differ in essence: only the title and the organisation of work were changed, and the purpose was indeed to overcome the difficulties he was making. He is evading the real issue which is his own refusal to perform a task covered by his job description.

He is wrong to make out that the real reason for dismissal was not his serious misconduct but the abolition of his post. His application for the post of operations analyst was treated impartially. Other applicants were better than he and the Organization would be willing to produce the evidence he wants, though it fails to see the point. Quite apart from the issue of qualifications, it would have been ill-advised to promote someone who bore a grudge against the Organization and intended to leave. The Tribunal has in several cases upheld such grounds.

The complainant's insubordination was quite unwarranted and amounted to serious misconduct punishable with dismissal. So held the Joint Disciplinary and Appeals Committees. The Organization gave him three months' notice, and went on paying him in that period even though he had stopped work, and granted him the termination indemnity. So he is mistaken in seeing the sanction as disproportionate.

As to his contention that he was not fully compensated for overtime, he could have challenged the decision of 5 October 1992 settling his entitlements or his last pay slip which stated the amount of overtime compensated. Having challenged neither, he has failed to exhaust the internal means of redress and on that score his complaint is irreceivable. Subsidiarily, it pleads the difficulty of reckoning the exact amount of his overtime two years afterwards. Anyway he has made several mistakes in his calculations.

To pay him the whole of his salary from the date of suspension would be unfair since he was paid throughout the three months of suspension and until 5 October 1992. He also received a termination indemnity and unemployment benefit from French social security and must give credit for them.

D. In his rejoinder the complainant concedes that the task he was asked to perform was part of his job but still contends that his supervisors showed bias and his work was downgraded. He also maintains that the real reason for dismissal was reform of the EDP Section.

He disagrees with the Organization's calculation of his overtime and says that in his letter of 24 July 1992 he could not have challenged the decision settling his entitlements, which he did not get until 5 October. In any case the settlement derived from the decision of 2 July 1992, which was not a final one. He again distinguishes between special and personal working hours and points out that only the latter were mentioned in his letter of acceptance.

The challenged decision is the one of 20 March 1992, of which the other two were mere corollaries.

Lastly, he alleges abuse of authority on the part of the Organization: his personal records - of which he again seeks production - had until then been favourable, and other officials had suffered less severely for the same offence.

E. In its surrejoinder the Organization enlarges on its earlier pleas.

The decision under challenge is the one not of 20 March but of 2 July 1992, whereby on the recommendation of the Joint Disciplinary Committee the Secretary General dropped the charge arising out of the incident of 25 October 1991.

The complainant did show insubordination by refusing a task that was part of his job. Neither his workload nor his rejection for the post of operations analyst in January 1992 warranted his stand. The Organization did not suspend him so that it could do away with his post, and had not anticipated suspending him, as is plain from its enrolling him for expensive training courses.

Despite a mistake in his letter of acceptance there was no doubt that he had special working hours as defined in Article 74 of the Staff Rules and not personal working hours within the meaning of Article 76. As to the matter of overtime his complaint is in any case irreceivable since he failed to exercise his right to challenge within 30 days the settlement of his entitlements.

CONSIDERATIONS:

1. The complainant joined Interpol on 23 November 1989 as a system programmer. He was suspended from duty on 20 March 1992 and after disciplinary proceedings dismissed with three months' notice by a decision of 2 July 1992. He applied for review of that decision but the Joint Appeals Committee recommended upholding the sanction. The Secretary General of the

Organization agreed and therefore rejected his application by a decision of 12 January 1993, which he has duly challenged in this complaint.

2. Before taking up his pleas the Tribunal will sum up the factual background to the disciplinary proceedings. The complainant was responsible for operating, updating and saving computer files and data bases on several systems: IBM, Digital and Wang according to his job description. Early in March 1992 he was told he was to be in charge of a new operation which consisted in transferring data on magnetic tape from an IBM system known as CIS to a new one on Wang, known as ASF, that was being brought in. He refused to comply. The head of the EDP Section was so informed on 12 March and sent a memorandum on 17 March to all his staff setting out the organisation of work and stating just what operations the complainant was in charge of. The memorandum stated that "daily operations for the ASF system consist in transferring name data from the IBM to the Wang 8210 by means of a magnetic tape". The complainant expressed "disagreement" with the memorandum and again refused several times to carry out the exercise. On 19 March the head of Division IV ordered him to do so, saying it would take just a few minutes and, when the complainant again refused, warned that he would be reported to the Secretary General for disciplinary action. The next day the head of division submitted a detailed report to the Secretary General and summoned the complainant to his office to say that he had recommended suspension from duty. When invited to comment the complainant answered that he had not changed his mind and then he left the office. An hour later he was informed that he was summarily suspended without loss of pay and that disciplinary proceedings were to be brought against him for insubordination and for a "professional fault" committed on 25 October 1991.

3. The case went to the Joint Disciplinary Committee. In the formal statement it put to the Committee Interpol charged the complainant with the offence of leaving work on 25 October 1991 - with serious consequences - before finishing a "back-up operation" and with gross insubordination in March 1992. In its report of 24 June 1992 the Committee held that though the incident of 25 October 1991 had shown negligence it afforded "no grounds for disciplinary action"; but in March 1992 he had been guilty of "wilful and repeated insubordination", had never since shown "the slightest contrition or change of mind" and had offered "unacceptable explanations for his behaviour". It unanimously recommended dismissing him for serious misconduct but letting him have notice and the termination indemnity.

4. The Secretary General agreed in the main: though he withdrew the charges arising out of the incident of 25 October 1991 he took the view that the complainant's insubordination amounted to serious misconduct warranting dismissal.

5. To challenge the sanction the complainant puts forward pleas that relate both to his suspension from duty on 20 March 1992 and to the decision of 2 July 1992 to dismiss him.

6. In his submission the procedure prior to the suspension was flawed in that he was denied due process and was not allowed to see all the evidence on which the Organization based its charges against him. But he is mistaken. The suspension procedure provided for in Article 112 of the Staff Rules must be expeditious if the Organization is to remove quickly someone to be charged with a disciplinary offence. There is no question at that stage of letting the official have all the written evidence on which the charges against him are to rest. All that need be said here is that the complainant was given clear and accurate information about the disciplinary action his behaviour was deemed to warrant. The conclusion is that there was no breach of due process.

7. He dwells at length on the circumstances surrounding the incident of 25 October 1991 in an attempt to show that his behaviour did not warrant disciplinary action. But, as the foregoing account reveals, that particular charge was dropped on the recommendation of the Joint Disciplinary Committee. So Interpol's reliance on it as grounds for the provisional measure of suspension caused him no injury.

8. The nub of his case is in fact not the suspension but the decision of 2 July 1992 to dismiss him.

9. His first plea is that the facts held against him did not amount to serious misconduct. Yet it is plain on the evidence that despite several warnings he acted in breach of Article 6(1) of the Staff Rules:

> "Officials in command of departments shall maintain discipline within those departments, and their subordinates shall respect that discipline. Subordinates are entitled to express their views on the work they are given to perform and for which they are answerable to their immediate superiors, it being understood that they must, on the one hand, give those superiors all the information required for taking decisions and, on the other hand, comply with all decisions taken and obey the instructions they receive. ..."

So if he thought his new task outside the ambit of his job description - though the evidence fails to bear that out - he was free to tell his supervisors of his views but not to disregard his duty to "obey the instructions" he had received. His acts of disobedience were undeniably tantamount to misconduct warranting disciplinary action.

10. He then argues that the punishment is out of proportion to any offence he may have committed. Again he is wrong. As the Joint Disciplinary Committee unanimously held, he was guilty of "wilful and repeated insubordination", had never since shown "the slightest contrition or change of mind" and had offered "unacceptable explanations for his behaviour". The conclusion is that in the circumstances there was nothing disproportionate about the sanction.

11. Nor does the complainant succeed in his contention that Interpol's real intent was to abolish his post as system programmer and replace it with one for an operations technician. There is no evidence to bear that out. Even if the Organization did mean to reform its computer service, that afforded no grounds for the complainant's disobedience let alone for supposing, as he makes out, that such abolition prompted his dismissal.

12. Lastly, he challenges the reckoning and settlement of overtime hours. On that score he has failed to exhaust the internal means of redress that were available to him. Interpol's plea that the claim is irreceivable therefore succeeds.

13. The evidence already filed by the parties suffices for a ruling on the case and there is no need to allow the complainant's application for the production of his personal file. His claims therefore fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re YATH-CRUCES Judgment 1347

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Alida Yath-Cruces against the Pan American Health Organization (PAHO) on 30 March 1993 and corrected on 13 May, the Organization's reply of 10 August, the complainant's rejoinder of 22 September and the PAHO's surrejoinder of 3 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article I of the Staff Regulations, Staff Rules 110, 1110 and 1130 of the PAHO and Manual paragraph II.2.1130;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The PAHO has a "University Assistance Program" (UAP) under which it gives financial aid to staff members engaged in university studies. In 1978 it issued a "Policy statement on staff development and training" which provides under section 15 for costs to be "shared" with a staff member who has been granted approval for his course if it is in the Organization's interest and if he meets certain academic requirements.

The complainant, a Guatemalan citizen, joined the staff of the PAHO in 1975 as a typist-clerk at grade G.3. She has been an office assistant at grade G.6 since July 1984.

On 19 May 1983 she submitted a "training nomination and authorization form" to get financial aid under the UAP for a course in the "Community Studies Program" of the American University at Washington, D.C. She claimed 75 per cent of the cost of tuition and other related fees, the other 25 per cent to be left, according to the form, "for staff member" to pay.

In a memorandum of 18 July 1983 the Chief of Personnel authorised reimbursement of 75 per cent of the cost of tuition but not of "books and course materials". He told her that refund would be subject to satisfactory completion of her course and "evidence of payment".

Having met her first claim in 1983, the PAHO did so for thirteen other courses up to 1989. She also got financial aid from the University during the same period.

In a memorandum of 12 December 1989 the Chief of the Staff Development and Training Unit of the Personnel Department, known as APL/SDT, asked her to say how much she herself had paid towards tuition for each course during the 1988-89 biennium and how much the Program had paid. Some months after returning from maternity leave she provided a statement of accounts from the University dated 4 March 1991 and covering the years 1988 to 1991. On 9 May 1991, in answer to a request from the PAHO and with her consent, the University supplied a breakdown of her account as from 1983.

In a memorandum of 11 July 1991 the Chief of APL/SDT told her that the Organization's policy was to reimburse 75 per cent of "actual payments made by the student only"; that it had overpaid her in the amount of 7,182 United States dollars; that it would be making arrangements to recover the overpayment; and that under the circumstances her re-enrolment in the University Assistance Program did not seem "possible".

In a memorandum of 16 July 1991 the Chief of Administration asked the internal auditor to review her case for "apparent discrepancies in the use of the Organization's funds". The auditor reported on 24 July 1991 that the complainant must have known "she was making money on her courses at PAHO's expense".

By a letter of 19 August 1991 the Chief of Personnel informed her that "financial discrepancies" in her favour which the auditor had revealed were a "very serious matter"; he accordingly gave her notice under Staff Rule 1130 ("notification of charges and reply") of dismissal for misconduct and invited her to reply within eight days to the charge of intent to defraud the PAHO.

On 27 August 1991 she sent the Chief of Personnel a reply denying dishonourable or fraudulent behaviour on her part and offering to repay the disputed sums.

On 30 August she, her counsel, the Chief of Administration, the Chief of Personnel and a staff representative attended hearings on her case.

In a letter of 7 October 1991 the Chief of Personnel informed her that the Administration had cleared her of intent to defraud; but her having applied for and got more money for university studies than the authorised amounts cast doubts on her judgment; he was therefore relieving her of responsibility for petty cash and called on her to repay the amounts she had got from the PAHO towards tuition.

On 2 December 1991 she sent the secretary of the Headquarters Board of Appeal notice of intent to appeal against "arbitrary removal of duties" and improper disciplinary action. In its report of 4 November 1992 the Board recommended that the PAHO should restore her financial duties and reverse the ban on her rejoining the UAP. But the Board recommended rejecting her claims to refund of the amounts she had already paid back and to moral damages.

In a letter of 29 December 1992, which she impugns, the Director agreed to consider letting her participate in the UAP but failed to restore her former financial duties.

B. The complainant submits that the PAHO took unlawful disciplinary action against her. She has three main pleas.

She contends, first, that there were no grounds for disciplinary action. Staff Rule 1110.1 says that "a staff member who fails to observe the standards of conduct as defined under Article I of the Staff Regulations and Staff Rule 110 shall be subject to disciplinary measures". Of the various obligations that Article I cites only those mentioned in paragraph 1.7 might have a bearing on her case. That paragraph forbids the acceptance of favours, gifts or remuneration, among other items, from sources other than the PAHO only "if such acceptance is incompatible with [the official's] status as an international civil servant". But accepting aid from the American University's Community Studies Program cannot have been at odds with her status since the PAHO approved of her taking part.

As for the two sections of Rule 110 that go beyond the provisions in Article I, paragraph 110.6 requires officials to report to the Director any gifts from outside sources, and she did so. Paragraph 110.8 defines "misconduct", and the only possibly relevant clause is 110.8.3, which forbids "any improper use or attempt to make use of [the official's] position as a staff member for his personal advantage". Since the complainant used all the money for her education she did not stand to gain any "personal advantage" within the meaning of 110.8.3. Besides, the PAHO cleared her of any intent to defraud.

Her second plea is that even if disciplinary action was warranted, the measures actually taken were improper. Under 1110.1 there are five types of disciplinary action: oral reprimand, written reprimand, reassignment with or without reduction in grade, dismissal for misconduct and summary dismissal for serious misconduct. The complainant had to repay with interest - in only twelve months - the monies received and lost "petty cash responsibilities" and her right to participate in the PAHO's University Assistance Program. Such measures were not authorised under 1110.1.

Lastly, she objects to the PAHO's changing the rules ex post facto. There being no mention of the UAP in the rules, the only written guidelines were in the letters authorising reimbursement of the costs of particular courses, none of which addressed the issue of financial aid from other sources. Only after the material time did the PAHO change the letters to require reimbursement of amounts paid to staff members who had received grants from other sources. Having qualified for aid and used the funds she got for none but the intended purpose, she found herself having to reimburse the Organization, which publicly disgraced her and banned her from taking part in the UAP. She had to borrow money to meet the PAHO's "heinous" deadline for repayment: that was not what she had in mind when she offered to pay the PAHO back.

She seeks the restoration of her petty cash responsibilities and the right to take part in the UAP; refund of the $7,308.72 she has already repaid to the PAHO; payment of the expenses she incurred in the amount of $7,159.36 to meet the PAHO's deadline; and awards of moral damages and costs.

C. In its reply the PAHO contends that it did not take disciplinary action against her under 1110.1. Having established that she had no intent to defraud, it had no cause to open disciplinary proceedings. But since she "transgressed the intent, letter and legitimate purpose" of the UAP the PAHO had, for the sake of sound administration, to recover any sums mistakenly paid out. Since she had failed to show a firm grasp of financial procedures it was only prudent to take away her responsibility for petty cash.

The PAHO denies changing the rules ex post facto: the purpose of the UAP is to relieve staff members of 75 per cent of their actual tuition costs, as the letter approving her application made plain. But she claimed reimbursement of the costs which the University was meeting. Instead of $8,602.50 she should have got $1,420.50. It does not matter how she used the difference inasmuch as it amounted to unjust enrichment.

The PAHO points out that the Director told her in his letter of 29 December 1992 that he was willing to consider her for further participation in the UAP in keeping with established procedure, but she has not applied for further assistance. Nor has she sustained any moral injury.

D. In her rejoinder the complainant points out that over a period of six years she reported payments from the Community

Studies Program of the University on fourteen statements of charges, each of which showed plainly that the Program had met her tuition costs. But the Administration consistently granted her aid. In the absence of express provisions in the rules that practice is binding.

If the grant of such aid was wrong the Administration is to blame for failing to take due account of the information she gave it. By removing her petty cash duties the PAHO acted as if she, not the Administration, had authorised the fourteen payments and it besmirched her good name. As she had duly discharged financial duties since 1984 it was vindictive, not "prudent", to take them away.

As to her participation in the UAP she observes that the Director merely said he would "consider" the matter: that is not the same as allowing her back in.

E. In its surrejoinder the Organization presses its earlier pleas in the reply. That the Administration failed to treat a line in her statements of charges as payment of tuition costs does not warrant unjust enrichment. Nor may she plead ignorance of the PAHO's policy on financial aid for study: the Organization had set out its policy in terms any university student should understand. She is wrong to treat any duties as her "property". The Director has acknowledged her right to take part in the UAP.

CONSIDERATIONS:

1. The complainant, who joined the staff of the PAHO in 1975, served from July 1984 as an office assistant at its headquarters in Washington, D.C., at grade G.6. Between May 1983 and June 1989 she followed fourteen courses at the American University in that city. For that purpose she applied for and obtained financial assistance under the Organization's University Assistance Program (UAP), which entitled a staff member following approved university courses to repayment of 75 per cent of tuition costs. In answer to her first application for such assistance the PAHO authorised payment of 75 per cent of the cost of her tuition and explained that "the cost of books and course materials" was not covered.

2. Under its Community Studies scholarship scheme the American University allowed the complainant full remission of 4,986 United States dollars in tuition fees for six courses and substantial remission of $4,565 for another seven. The PAHO alleges no irregularity over the fourteenth course; but for

those thirteen courses the tuition fees came to a total of $10,401, the University waived payment of $9,551, and the complainant therefore actually spent only $850. The PAHO's position is that she was entitled to reimbursement only of $637.50, or 75 per cent of her actual expenditure, whereas she had claimed and obtained $7,819.50, a sum purporting to correspond to 75 per cent of $10,401. So the over-payments, says the Organization, totalled $7,182.

3. By a memorandum of 11 July 1991 the Chief of the Staff Development and Training Unit, known as APL/SDT, informed the complainant of her obligation to return the sums overpaid and added that in the circumstances her re-enrolment in the UAP did not seem possible.

4. By a letter of 19 August 1991 the Chief of Personnel gave the complainant notice of dismissal under Staff Rule 1130 on the grounds of "misconduct". After reviewing the matter, however, he informed her by a letter dated 7 October 1991 of his conclusion that she had had "no real intent" to defraud the PAHO but he ordered her to refund the over-payments; he said that because she had obtained the over-payments the matter "raises questions about your good judgment" in the exercise of some of her duties, which related to the handling of petty cash; and he decided that she would therefore be relieved of "those duties relating to financial responsibilities" for petty cash and given "equivalent non-financial duties". The over-payments were in due course recovered from her.

5. On appeal the Headquarters Board of Appeal held in its report dated 4 November 1992, first, that the complainant should not have applied for the reimbursement of tuition costs remitted by the University, that the PAHO had acted correctly in requiring her to refund the over-payments and that her claims to moral damages and to the return of the amounts she had refunded should therefore be rejected; but it held, secondly, that because she had not acted with intent to defraud no disciplinary action should have been taken against her, and it therefore recommended restoring her responsibilities for petty cash duties, letting her take part in the UAP and paying one-half of her costs.

6. In a letter of 29 December 1992 the Director of the PAHO informed the complainant that he disagreed with the second conclusion and recommendation and that the modification of her duties did not amount to disciplinary action but was only an "administrative precaution" which the circumstances justified; however, he was prepared to consider her future participation in the UAP in accordance with its "policies, priorities and procedures". That is the impugned decision.

7. The complainant now seeks (a) the restoration of her right to participate in the UAP; (b) the repayment of the

amounts she was compelled to refund to PAHO, including interest, and the further costs incurred by her; (c) the restoration of her responsibilities for petty cash; and (d) awards of moral damages and costs.

8. The PAHO confirms in its reply to the complaint that in the impugned decision the Director has recognised her right to participate in the UAP. That being so, there is no need to entertain claim (a).

9. As to claim (b) the complainant pleads that payment to her of the $7,182 was justified for two reasons.

10. First, she says that she spent the amount on expenses incidental to the courses she followed, such as books, materials, transportation, parking fees and child-care. She contends that she used for educational purposes all the sums received by her from both sources and that the PAHO had never unambiguously prohibited the receipt of financial assistance from more than one source.

11. It was quite clear, however, that both the Organization and the University provided support only in paying tuition fees, not for any other purpose. The complainant was therefore not entitled to set off any other expenses she had incurred against the remission of tuition fees allowed by the University. What she was entitled to obtain from the PAHO was "reimbursement", i.e. recovery of 75 per cent of sums she had actually spent, not of the charges for tuition. The conclusion is that she might not recover under the UAP any part of what the University had granted, either directly or by way of remission of tuition charges, and that she had acted improperly by claiming reimbursement of anything more than 75 per cent of the $850 she had actually spent on tuition.

12. Secondly, the complainant says that she submitted statements of charges, supplied at the time by the University, in support of her periodic claims to reimbursement; from those statements APL/SDT was throughout aware that she was receiving financial assistance from the University; yet it paid her the full amounts she had claimed. That, she contends, was its "consistent administrative practice" over a long period, and it conferred on her entitlement to 75 per cent of the tuition charges.

13. She has produced only one such statement of charges for scrutiny by the Tribunal. It shows a credit of $1,044 on 8 July 1989, which was merely described as "Community Studies" without any indication as to whether it came from the University or had been paid by herself. But the detailed summary later provided by the University revealed that it consisted of a remission of $894 in charges for tuition and of a payment of

$150 made by the complainant on 18 July 1989. That statement was thus incomplete and inaccurate. The conclusion is that she did not take sufficient care to make full disclosure to the Organization of the assistance given by the University.

14. Having obtained financial benefits to which she was not entitled, the complainant was under an obligation to refund the over-payments and the PAHO was entitled to recover them. Manual paragraph II.2.1130 states that a staff member who is unable to repay an amount owed to the Organization in a lump sum may apply for permission to repay it within a reasonable time not exceeding twelve months.

15. As to claim (c) the complainant pleads that no disciplinary action should have been taken because she had no intent to defraud and that the recovery from her of the over-payments in just twelve monthly instalments and the removal of her responsibilities for petty cash constituted improper disciplinary action.

16. The enforcement, within the maximum period allowed by Manual paragraph II.2.1130, of her obligation to refund the over-payments did not amount to disciplinary action. Furthermore, the whole transaction revealed laxity on her part in regard to financial procedures and the PAHO was entitled to take administrative action to prevent lapses in the future. Changing her duties for those reasons may not be regarded as a disciplinary measure either.

17. Since the complainant has suffered no actionable injury, all her claims must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

SEVENTY-SEVENTH SESSION

In re EL MAHJOUB (No. 3)
(Application for review)

Judgment 1348

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Mohamed El Mahjoub on 9 March 1994 for review of Judgment 1325;

Considering Articles II, paragraph 1, and VI, paragraph 1, of the Statute of the Tribunal, Article 8(3) of the Rules of Court as in force at the date of the filing of the application and Article 7(2) of the Rules of the Tribunal as in force since 1 May 1994;

Having examined the written submissions;

CONSIDERATIONS:

1. As is recounted in Judgments 1213 and 1325, which dismissed his first two complaints, the complainant joined the staff of the International Labour Organisation in Geneva in 1985. In 1991 he was stationed at headquarters and held a fixed-term appointment which was to expire on 31 December of that year. After some correspondence the ILO offered him transfer to Tunis under a two-year contract. He lodged his first complaint on 17 January 1992 asking the Tribunal, among other things, to quash the transfer. The outcome of that complaint was Judgment 1213 of 10 February 1993: the Tribunal held that the Organisation had properly treated him as having refused the offer of transfer to Tunis and it dismissed all his claims.

2. The Organisation had given him notice on 31 October 1991 that his fixed-term appointment would expire at the scheduled date, 31 December 1991. He filed a second complaint on 19 April 1993 asking the Tribunal to quash the "unlawful actions" of the Organisation blocking his salary since January 1992, when, he said, he had been on sick leave, and forcing him out of his office in July/August 1992 and to award him damages in an amount corresponding to his "salaries" from 1 January 1992 up to the date of reinstatement and "for the period subsequent to the date of the Tribunal's judgment".

3. None of those claims could succeed unless the decision not to extend the complainant's appointment was quashed. In Judgment 1325 of 31 January 1994 the Tribunal held that his second complaint was devoid of merit and that that decision was the direct consequence of the refusal of transfer, which it had referred to in Judgment 1213 and which was therefore res judicata. In this, his third complaint, he is seeking review of Judgment 1325 on two grounds.

4. First, he contends that because he "did not submit any objections or appeal against" Judgment 1213, the res judicata rule did not operate to bar his second complaint.

5. He is mistaken. Judgment 1213 was "final" within the terms of Article VI(1) of the Tribunal's Statute: it determined that the Organisation had acted properly both in offering him transfer to Tunis and in treating him as having refused it. On those points his case was res judicata.

6. He then argues that his second complaint was based on a new decision by the Organisation, set out in the letter that the Director of the Personnel Department wrote him on 28 January 1993, (a) to withhold his salary for a period in which he was, he says, on sick leave, from 12 December 1991 to 1 March 1992, and for "the following months" and (b) to prevent him from doing his work.

7. Although he had raised the question of sick leave in correspondence with the Organisation, he made no claim on that score in his second complaint. So he may not seek review of Judgment 1325 in respect of the matter.

8. His other claims are identical to those the Tribunal took up and dismissed in Judgment 1325. He has not pleaded any of the grounds on which an application for review will be entertained and which are set out, for example, in Judgments 442 (in re de Villegas No. 4) and 704 (in re Verron No. 2).

9. The Tribunal will therefore summarily dismiss his application as being clearly irreceivable and devoid of merit within the meaning of both Article 8(3) of the Rules of Court as in force at the date of filing and of Article 7(2) of the Rules as in force since 1 May 1994.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re ZAGO

Judgment 1349

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lorenzo Zago against the European Southern Observatory (ESO) on 23 June 1993, the ESO's reply of 27 September, the complainant's rejoinder of 17 December 1993 and the Observatory's surrejoinder of 15 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article IV 1.02 of the Combined Staff Rules of the ESO and Articles R II 1.17, R II 6.03 and R II 6.11 of the ESO Staff Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article R II 1.17 of the ESO Staff Regulations says that a staff member's initial fixed-term contract may be extended up to a maximum of nine years, after which the Director General will grant an indefinite contract or terminate the fixed-term one. Article R II 6.03 of the Combined Staff Rules further states that a fixed-term contract shall expire at the end of the prescribed period and the Director General's decision whether or not to renew it shall be notified at least six months before expiry.

The procedure for granting indefinite contracts is set out in a memorandum the Director General issued on 21 October 1988. Proposals come from the Contract Advisory Committee, which follows the criteria set out under (a), (b) and (c) in 6 below.

The complainant, an Italian, joined the ESO at its headquarters at Garching, near Munich, on 1 October 1984 as an engineer/physicist on a fixed-term appointment for three years. He was assigned to the Telescope Engineering Department

(TED) of the Very Large Telescope (VLT) Division. He had his appointment confirmed after probation and on 18 March 1987 had it extended by three years, from 1 October 1987 to 30 September 1990.

By a memorandum of 27 October 1989 the Director General, on the recommendation of the Contract Advisory Committee, decided not to grant him an indefinite appointment but to renew his contract for another three years, until 30 September 1993.

By a memorandum of 7 December 1989 the head of TED put him in charge of VLT's enclosures and buildings. By then he had reached grade 10.

Disappointed at still being refused an indefinite contract, he wrote to the Personnel Department and to the Director General on 28 March 1990 asking whether he would be paid termination and reinstallation indemnities if he left before the end of his new three-year appointment. By a letter of 29 March 1990 the Director General told him he would.

Because of reforms in VLT he was assigned at the end of 1991 to another group in TED but from there seconded to the Site and Building Group.

By a letter of 16 January 1992 he asked the Director General for formal transfer to the Site and Building Group and said he was willing to give up his full-time job if he might continue part-time work with the ESO. Although the leader of the Site and Building Group endorsed that proposal in a memorandum of 16 December 1991 to the head of VLT, the Director General did not act on it.

In a memorandum of 24 November 1992 to the head of VLT the complainant said that pending written notice to the contrary and "the formal signature of the contract" he would consider himself "in charge of the technical responsibility of the development of the VLT Enclosures".

The head of VLT informed him in a memorandum of 4 December 1992 that since he had said about a year earlier that he would be leaving someone else had been put in charge.

By a letter of 18 December to the Director General the complainant challenged the decision to relieve him of that duty. In a reply of 5 January 1993 the head of Administration said that since the decision had not come from the Director General his letter could not be treated as an internal appeal.

In a letter of 19 January to the Director General he said he wanted to have his "general situation ... clarified". In a memorandum of 28 January 1993 the Director General asked the head of Personnel how to proceed to end the complainant's appointment.

In a document addressed on 8 February to the Contract Advisory Committee the head of VLT recommended giving him neither an indefinite contract nor an extension nor part-time work.

In its report of 1 March 1993 the Committee advised the Director General not to grant him an indefinite contract but just to let his appointment expire at 30 September 1993.

By a letter of 25 March 1993 the head of Personnel informed him of the Director General's decision to endorse that recommendation.

By a memorandum of 29 March to the Personnel Department one of the complainant's supervisors, who had sat on the Committee, expressed reservations about the recommendation and suggested letting him have "a prolongation in whatever form".

By a letter of 19 April the complainant asked the head of Personnel to give the reasons for the decision of 25 March. The head of Personnel replied on 28 April.that the reasons were that there was no long-term structured requirement for his post and his performance was unsatisfactory and that under Article IV 1.02 of the Combined Staff Rules no internal appeal lay against non-renewal.

The letter of 25 March 1993 is the impugned decision.

B. The complainant has three pleas.

First, he alleges that the head of VLT was prejudiced against him. Annoyed by the complainant's critical remarks about VLT, the head of VLT had whittled down his responsibilities so as to get rid of him. It was plain - for example from the memorandum of 28 January 1993 - that the Director General intended, even before the procedure for granting indefinite appointments had begun, to put an end to his appointment. Since the impugned decision was taken at the instigation of the head of VLT it is flawed with abuse of authority.

His second plea is misappraisal of the facts. The argument that there was no long-term structured requirement for his post rests solely on the head of VLT's efforts to strip him of responsibility. The ESO is to create 34 posts, including several in the very field it recognised him to be qualified for. Yet even if the reason were true the Director General ought to have applied the provisions on abolition of post in Article R II 6.11 of the Regulations and looked at the opportunities for transfer.

It is untrue that his performance was unsatisfactory: in nine years with the ESO he never drew a single reproach.

Thirdly, he submits that the procedure for granting indefinite appointments was flawed by the frequent participation of the head of VLT, who himself put the recommendation to the Director General instead of offering a written opinion and who took part in the Advisory Committee's meeting. He exerted undue influence.

The complainant asks the Tribunal to quash the Director General's decision of 25 March 1993 and make him awards of damages equivalent to two year's salary, indemnities and allowances and of costs.

C. The ESO replies that the complaint is devoid of merit.

In declining to give the complainant an indefinite appointment the Director General exercised his discretion in the Observatory's interests and strictly complied with the material rules, particularly Article R II 1.17 of the Regulations.

The decision of 25 March 1993 was based on proper appraisal of the facts. From the start the complainant's appointment was linked to the specific task of helping to develop and work out a design for building the VLT enclosures. He seems to have come independently to the view that there was no long-term need for his services, since he stated in his letter of 16 January 1992 to the Director General that he had completed "a whole phase of activities" he had started in 1984. Moreover, at the end of his second appointment the Advisory Committee noted that his management skills were not entirely satisfactory and that he had become less keen.

In the ESO's submission there was no personal prejudice against him. The head of VLT was merely discharging his responsibility as the official in charge of the complainant's post after the complainant had announced he would be going.

The impugned decision shows no procedural flaws. It was only natural that the Director General should ask the Division leader to say whether someone working under him should get an indefinite appointment. The complainant's charge of bias against the Advisory Committee is merely speculative. The opinion the Director General expressed in the memorandum of 28 January 1993 did not prejudge the final decision.

D. In his rejoinder the complainant asserts that in his letters of 28 March 1990 he was merely enquiring what his entitlements would be if he resigned; he had no intention of leaving, particularly as his assignment to the System Engineering Group in January 1991 gave him full job satisfaction. Only after the head of VLT took away his responsibilities did he contemplate part-time work. He presses his pleas and maintains in particular that his supervisors overlooked essential facts in the procedure for awarding indefinite appointments.

E. In its surrejoinder the Organisation presses all its pleas. It submits that the head of VLT was best fitted to define the needs of his Division, and that his taking part in the procedure did not make it unlawful. Besides, the Advisory Committee too considered that the complainant should not be given an indefinite appointment. His saying several times that he intended to leave in no way swayed the Director General's decision.

CONSIDERATIONS:

1. The complainant, who is a physicist and engineer, is challenging the ESO's refusal to grant him a contract of indefinite duration on the expiry of his last fixed-term contract, on 30 September 1993.

2. The Observatory recruited him on 1 October 1984 under a contract for three years. His original duties related to the "study phase" of installing a Very Large Telescope (VLT) in Chile or, to be more precise, the "study and analysis of the technical concept for the VLT enclosures". He had his contract twice renewed, each time for three years, up to the maximum period of nine years allowed under the Staff Regulations for fixed-term appointments. Once the maximum had been reached the Director General had to choose between granting him a contract of indefinite duration and terminating his appointment.

3. The Director General opted for termination and so informed him on 25 March 1993, i.e. six months before the expiry of his appointment, that he was not to get a contract of indefinite duration.

4. The complainant seeks the quashing of that decision and damages equivalent to two years' pay. He has two main pleas. The first is abuse of authority in that the impugned decision was not prompted by the Observatory's interests, and the other plea is that there was breach of the material rules of form and of procedure.

5. Before taking up those pleas the Tribunal will set out the material provisions. Article R II 1.17 of the ESO Staff Regulations reads:

> "Staff members shall receive on appointment a fixed-term contract of not more than 3 years' duration. This contract may be renewed or extended once or more often to cover a maximum period of not more than 9 years. After this period of 9 years, the Director General will grant an indefinite contract, or the contract will be terminated."

And Article R II 6.03 of the Regulations states:

> "A fixed-term contract shall expire at the end of the prescribed period. The Director General may renew it or not; his decision shall be notified to the member of the personnel at least 6 months before the date of expiry, if the contract is of sufficient duration. ..."

6. For the grant of indefinite contracts the Director General has laid down a procedure in a memorandum he issued on 21 October 1988. The memorandum sets out the following rules. Any decision by the Director General on the grant of an indefinite contract must follow consultation of the group leader, the management team and a Contract Advisory Committee. The Committee is the main feature of the new rules. It is to consist in each case of four members: the official's first-level supervisor; a staff member named by the Director General who must be at least equal in grade to the official; a representative of the Staff Association; and a representative of the Administration who serves as convenor. The memorandum defines as follows the criteria that those consulted are to bear in mind:

> "(a) There is a long-term structured requirement for the position concerned.
>
> (b) The staff member concerned has fully met the requirements of the post he/she is occupying at the time of the review and he/she has the necessary profile and aptitudes to further advance in his/her career within his/her specialisation or in other related fields.
>
> (c) The staff member's performance warrants an indefinite appointment."

The alleged abuse of authority

7. The complainant contends that the decision not to convert his fixed-term appointment into an indefinite one was taken on the strength not of the Observatory's interests but of

several subjective factors: the uncertainty of his administrative status due to his secondment from one unit to another; the hostility of the head of VLT, who was irritated at critical but constructive remarks he had made about the development of the project; and the bad appraisal of his services and his fitness for service over the long term.

8. In answer the Observatory offers two main pleas. First, it points out that the complainant is a physicist rather than an engineer and that his skills, though suited to the requirements of preparatory work on the Very Large Telescope, would over the long term have become much less useful once the preparatory stage was over and there began the stage of execution, which calls for other skills.

9. Secondly, the Observatory is fairly critical of the complainant's past services. Though he made a promising start, it says his performance slackened, he proved unable to adapt to the shifting requirements of successive assignments, he did not get on well with others and he was careless in following up contracts subject to his control.

10. The case law states the principles that govern this dispute between an organisation and a staff member who - it does not deny - shows some merit. The complainant himself refers to Judgments 588 (in re Ido), 600 (in re Freeman), 892 (in re Riseley) and 1037 (in re Baudet), and a more recent reaffirmation of the principles is in Judgment 1317 (in re Amira), in particular in 24.

11. The case law shows that an organisation enjoys wide discretion in deciding whether or not to renew a fixed-term appointment and *a fortiori* whether to convert it into an indefinite one. The exercise of such discretion is subject to review, but only to limited review, the Tribunal respecting the organisation's freedom to determine its own requirements and the career prospects of staff.

12. When seen in that light the complainant's objections appear quite devoid of merit. It is plain on the evidence that the impugned decision was fully warranted by the Observatory's objective interests as demonstrated on cogent grounds. In view of those interests the decision not to grant the complainant an indefinite appointment may not be attributed to any personal hostility towards him or to any other circumstance of a personal kind.

13. As for the appraisal of his services, the evidence shows that the Observatory by no means overlooked his accomplishments as a physicist in his own special field. Its qualified position makes it all the easier to accept its opinion of his services, which was on the whole unfavourable.

One salient point is the requirement in the memorandum of 21 October 1988 that any applicant for an indefinite appointment should "fully" meet the requirements of the post he held under a fixed-term one. Unless there is a glaring error the Tribunal will not interfere with the assessment.

14. One last remark is that professional shortcomings are a typical justification for straightforward separation on expiry of a temporary appointment: the Tribunal ruled on cases fairly similar to this one in Judgments 1038 (in re Duguet), 1128 (in re Williams), 1262 (in re Scherer-Saavedra) and 1273 (in re Oiga).

The alleged breach of due administrative process

15. The complainant contends that the ESO failed to observe due administrative process in his case. The gist of his criticisms is the following.

> A memorandum of 28 January 1993 reveals that before the proceedings began the Director General and the head of VLT had already been planning together not to renew his appointment.
>
> The Contract Advisory Committee was not properly constituted. One member was the head of VLT, who was already prejudiced against him, and another was the leader of a group to which he had had only a fictitious transfer.
>
> The ESO took no account of the reservations expressed by two of the Committee's members.

16. His objections must be viewed in the context of due administrative process and, more specifically, the guidelines in the memorandum of 21 October 1988.

17. Though the memorandum of 28 January 1993 does express the intention of the Director General and the head of VLT not to continue his appointment, it also betokens their attachment to due process, in other words to honour the safeguards that officials derive from the procedural rules and the rating standards in the memorandum of 21 October 1988.

18. There was nothing improper about the membership of the Contract Advisory Committee in this case. Since the complainant belonged at the time to two administrative units it was only reasonable that both his first-level supervisors should sit on the Committee. That they did was in no way to his detriment since according to the Committee's minutes all the members were agreed on the main issue, which was whether to

grant him an indefinite contract. As for the head of VLT, the minutes say that the Committee asked him to state his views and to rate the complainant's past performance. That was a perfectly proper means of informing the Committee.

19. Lastly, the reservations expressed by two members are irrelevant to the thrust of the decision, on which the Committee was unanimous; they were about the possibility of granting him a limited contract instead of the indefinite appointment he was being refused.

20. The conclusion is that, although from the outset the head of VLT and the Director General did not intend to continue the complainant's appointment, they did abide by the procedure set out in the memorandum of 21 October 1988. The complainant was kept informed throughout the proceedings of the ESO's intentions and the grounds for the action it was taking. As things turned out the Committee came to the same view as the head of VLT and the Director General about whether or not to grant him an indefinite appointment. So he may not properly object to any breach of due administrative process.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

Registry's translation
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re BLINKER

Judgment 1350

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lesley Blinker against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 21 October 1993 and corrected on 4 November, UNESCO's reply of 20 December 1993, the complainant's rejoinder of 7 February 1994 and the Organization's surrejoinder of 15 March 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, UNESCO Staff Regulations 1.2 and 9.1, UNESCO Staff Rules 103.19, 104.1(b)(iv), 104.6, 104.11 bis, 104.15 and 109.6, and paragraph 7(a) of the Statutes of the UNESCO Appeals Board;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Suriname who was born in 1961, joined UNESCO on 15 October 1989 under a one-year appointment at grade P.1. His letter of appointment of 11 September 1989 stated, among other things, that he would be assigned at first to several units by way of training. He served as a probationer in the Environmental Education Unit (ED/STE/ENV) of the Education Sector from 2 January to 31 March 1990; in the Water Sciences Division (SC/HYD) from 2 April to 30 June; and in the Ecological Sciences Division of the Natural Sciences Sector (SC/ECO) from 2 July to 30 September 1990.

By a memorandum of 18 October 1990 a personnel officer informed him that he was to be an assistant programme specialist at grade P.1, step 2, as from 1 October in the Coordination and Evaluation Unit of the Sector of Communication, Information and Informatics (CII) and that his appointment was being extended from 15 October 1990 to 14 October 1992.

In accordance with Rule 104.11 bis the head of the unit wrote a report on 5 July 1991 about his performance from October 1990 to 14 June 1991 and it spoke of some shortcomings. He signed it on 22 July but said that he intended to challenge it. The matter went to the Reports Board, which recommended leaving the report as it stood. The Director-General endorsed the recommendation and so informed the complainant on 15 October 1991.

By a memorandum of 11 December the Chief of Personnel (PER/ADM) told the complainant that in accordance with Regulation 9.1 the Director-General had decided to terminate his appointment at 31 December 1991 and pay him three months' salary in lieu of notice.

On 10 January 1992 the complainant sent the Director-General through the Deputy Director-General for Management and the Director of the Bureau of Personnel a memorandum asking for review of the termination under paragraph 7(a) of the Statutes of the Appeals Board. By a memorandum of 18 March 1992 the Director of Personnel informed him that the Director-General upheld the decision and on 23 March he appealed against the confirmation of termination.

In its report of 9 June 1993 the Appeals Board recommended that the Director-General reject the appeal. The Director-General endorsed the recommendation and so informed the complainant in a letter of 22 July 1993, the impugned decision.

B. The complainant challenges the decision to terminate his appointment inasmuch as it rests on his alleged incompetence. In his submission he had the right training and qualifications for a job in the field of science. While on probation in the Education Sector he was found quite satisfactory, as was plain from the performance appraisal of 9 May 1990. But his job in the Communication Sector did not suit his qualifications, so it was only to be expected that he would get a poor report on his work there. That report not only prompted his dismissal but has blighted his prospects of finding work elsewhere.

The decision to dismiss him, which came out of the blue just before Christmas, caused him serious injury: his salary was blocked, not until much later did he get the three months' salary in lieu of notice, and his wife had to pay for his Christmas holiday in Suriname.

His termination caused him moral injury because his wife was also an employee of UNESCO.

He asks the Tribunal to quash the report on his performance from October 1990 to 14 June 1991 and the "decision of the

UNESCO Appeals Board" of 9 June 1993 and to order his reinstatement in a suitable post in the Sciences Sector or, failing that, some other suitable post. He seeks material and moral damages in the amount of 100,000 United States dollars or the equivalent in French francs.

C. In its reply UNESCO submits that it terminated the complainant's appointment because he was unable to perform his duties, i.e. for reasons that related to its own requirements and interests. In any event the decision was taken by the Director-General at his discretion and in accordance with the rules.

The complainant could have appealed against the Director-General's decision endorsing the Reports Board's recommendation, in accordance with Rule 104.11 bis (f) and paragraph 7(a) of the Statutes of the Appeals Board. He failed to do so. His claim to the quashing of his performance reports is therefore irreceivable because he has not exhausted the internal means of redress. The report criticised not so much his technical shortcomings as his unwillingness to adapt to his duties. So it is mistaken for him to say that the reason why his work was found unsatisfactory was that his job in the Coordination and Evaluation Unit of the CII Sector did not match his qualifications.

His claim to reinstatement in the Sciences Sector is irreceivable: having again omitted to challenge his assignment to CII, he has not exhausted the internal means of redress, as Article VII(1), of the Tribunal's Statute requires. In any case the discretion conferred on the Director-General by Regulation 1.2 precludes any entitlement to choice of sector.

Lastly, UNESCO denies that it caused the complainant any actionable injury.

D. In his rejoinder the complainant submits that it was a mistake for the performance report for the period from October 1990 to 14 June 1991 and for the Reports Board to say that he was then on probation. He held a fixed-term contract from 1 October 1990 to 14 October 1992. So according to Rule 104.11 bis (a) no performance appraisal was due until six months before the end of his appointment. The appraisal therefore shows errors both of fact and of law.

As Regulations 1.2 and following and circular 1743 of 5 November 1990 required, the complainant's supervisor ought to have written a description of his duties and let him have it promptly. But despite his repeated reminders the Bureau of Personnel and his supervisor did not sign and date his job description until five or six months after the start of his fixed-term appointment.

The reason why he did not challenge the report on his performance from October 1990 to 14 June 1991 was that he did not want to make "relations with his employer worse". UNESCO "misled" him: had he realised it meant to terminate his appointment he would certainly have challenged the report.

The Organization did cause him injury: not until 11 December 1991 did it tell him that his appointment was to end on 31 December; it blocked his pay for December 1991 and January 1992 in breach of Rule 103.19, which requires monthly payment; and in breach of Rule 104.15 it left him in doubt for 24 months about whether it might take him back.

E. In its surrejoinder the Organization asserts that the complainant's job description was made out in reasonable time. Not only was he told what his job entailed as soon as he took up duty in CII but he had also got the final version of the job description, though he had refused to sign it. And, as circular 1743 requires, his performance was "the subject of on-going dialogue" between him and his supervisor and he was given constant guidance.

The Organization may not be held liable for his failure to exhaust the internal means of resisting the decision of 15 October 1991 not to alter his performance appraisal.

It denies that it infringed Rule 104.11 bis by not producing a performance report six months before the end of his appointment: 104.11 bis (a) says that such reports may also be made at any time by the Division or Bureau concerned. UNESCO maintains that it did observe the reporting procedure.

Referring to the case law, it submits that the complainant's claim to the quashing of the "decision of the Appeals Board" is irreceivable.

It again asserts that it caused him no injury warranting redress. It paid him salary in lieu of notice within a reasonable period after termination. It could not have done so any earlier because its usual practice is to take precautions to cover any debts a staff member may owe to its loans service and because there were terminal formalities he had to complete.

CONSIDERATIONS:

1. The complainant joined UNESCO on 15 October 1989. He was granted an appointment for one year and in that year was assigned as a probationer to the Environmental Eduction Unit of the Education Sector, then to the Natural Sciences Sector, spending three months in the Water Sciences Division and another three in the Ecological Sciences Division. At the end of the initial period he was transferred to the Coordination and Evaluation Unit of the Sector of Communication, Information and Informatics and granted him an extension of his fixed-term appointment which was to expire on 14 October 1992. A report dated 5 July 1991 on his performance from October 1990 to 14 June 1991 found it unsatisfactory. He challenged the report. His case went to the Reports Board, which confirmed the assessment and recommended that "the Bureau of Personnel should take the consequential action". On 11 December 1991 the Chief of Personnel notified to the complainant a decision of the Director-General to terminate his appointment at 31 December 1991, i.e. nine-and-a-half months before the date of expiry. On 22 July 1993 the Director-General upheld that decision on the recommendation of the Appeals Board. The complainant is asking the Tribunal to quash the termination, the performance report and the Appeals Board's "decision", order his reinstatement and award him damages.

2. Since the complainant failed to challenge the unfavourable assessment of his performance in an appeal to the Appeals Board the Tribunal will not entertain his objections on that score. Besides, he offers no evidence to suggest that they are plainly wrong.

3. Nor may he seek the quashing of what he calls the "decision" of the Appeals Board: according to the Staff Regulations the Board merely gives an opinion that is not binding on the Director-General.

4. But his claim to the quashing of the termination is receivable and he may properly challenge any feature of proceedings prior to that decision. On the evidence there were several mistakes or omissions that caused him injury.

5. First, as the Appeals Board pointed out, he was on probation for one year and was assessed after transfer to the Education Sector, but not on his performance in the Natural Sciences Sector from 2 April to 30 September 1990. His original letter of appointment of 11 September 1989 said that his appointment would be renewed for a fixed term in accordance with Rule 104.6 if his performance was deemed satisfactory at the end of probation. Though there was no objective assessment of him at the end of probation as both UNESCO's interests and his own required, it did offer him a two-year appointment.

That led him reasonably to suppose that it found his services satisfactory. But in fact it did not, as became plain from the report made on 5 July 1991, i.e. after the grant of the fixed-term appointment.

6. Secondly, that report, which was so poor as to prompt dismissal, purports to be a "probationary" one on the period from October 1990 to 14 June 1991. The authors and the head of the General Administration Sector, who in comments dated 18 July 1991 referred to the "evaluation of the Sector at the end of the probationary period", plainly intended to apply Rule 104.6. That rule says in (c) that "all initial fixed-term appointments shall be subject to a period of probation" and that the period is nine months when the appointment is for less than two years. At the end of that period the Administration may terminate if appraisal reveals unsatisfactory performance.

7. The Organization was free to assess the complainant's merits and skills at any time; on that score he is mistaken. But it was not free to treat him as still on probation. A memorandum that a personnel officer wrote to him on 18 October 1990 described his appointment from 15 October 1990 to 14 October 1992 as an "extension" of the earlier one for one year and so it was not an "initial" appointment. And although in its surrejoinder the Organization asserts the Director-General's discretion to extend probation and says that the complainant was still on trial, there is no evidence to bear out the contention that when it extended his appointment it meant to keep him on probation.

8. Thirdly, UNESCO was required by Staff Rule 104.1(b)(iv) to consult the Senior Personnel Advisory Board (SPAB) before termination and indeed it did so. But the letter asking the complainant and the Board's members to attend stated that the matter was the "non-renewal" of his contract. What in fact was at issue was termination.

9. The Organization pleads that the mistake was just an unintentional slip. The Tribunal accepts that; indeed, when the Board met, the Administration's report made it plain that the subject was the termination of a fixed-term appointment before the date of expiry. Yet it was not the first error in a serious case and it affords yet further evidence of the Organization's failure to act with the degree of care its employees may expect of it.

10. The conclusion is that there were several mistakes that flawed the termination proceedings. Regulation 9.1 does empower the Director-General to terminate "if the services of the individual concerned cease to be satisfactory". But a decision as important as termination before expiry of a fixed-term appointment on other than disciplinary grounds must

scrupulously observe due process and the safeguards that an appointment with an international organisation affords, whether under the contract or under the rules. In this case the procedure was flawed and the safeguards were not observed. The impugned decision to terminate the complainant's appointment therefore cannot stand, and UNESCO must pay him damages in an amount equivalent to the pay he would have been entitled to had his appointment expired on 14 October 1992, less the three months' pay he was granted in lieu of notice under Rule 109.6.

11. He has a further claim to damages for the allegedly late remittance of the three months' pay. It fails. Redress for all the other forms of injury he pleads, including moral injury, lies in the quashing of the decision and the award of damages reckoned as set out in 10 above.

12. He is also unsuccessful in his claim to reinstatement in a post in the Natural Sciences Sector or, failing that, any other suitable post. Despite the Organization's mistakes it is plain on the evidence, particularly the assessment in the report of 5 July 1991 - of which the factual elements are convincing - that the complainant would have had no prospect of renewal on normal expiry of his prematurely terminated appointment.

DECISION:

For the above reasons,

1. The Director-General's decision of 11 December 1991 terminating the complainant's appointment at 31 December 1991 and the confirmatory decision of 22 July 1993 are quashed.
2. UNESCO shall pay him damages in an amount equivalent to the pay he would have been entitled to had his appointment expired at the scheduled date, 14 October 1992, less the three months' pay he was granted in lieu of notice.
3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re LI Judgment 1351

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Zhisuo Li against the International Labour Organisation (ILO) on 6 December 1993, the ILO's reply of 4 March 1994, the complainant's rejoinder of 27 March and the Organisation's surrejoinder of 6 May 1994;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.2, 4.6, 6.7, 13.1 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the People's Republic of China who was born in 1955, joined the staff of the International Labour Office on 1 October 1990 as an "audio-typist" at grade G.4 under a fixed-term appointment for two years. He was assigned to the Chinese unit of the Typing and Text-Processing Section (DACTYL), which is part of the Printing and Typing Services Branch (PROTEXT) of the Office.

In the report, written on 9 April 1992, appraising his performance from 1 July 1991 to 31 March 1992 his supervisor said that the quality and quantity of his work had shown "remarkable improvement". The ILO extended his appointment by one year from 1 October 1992.

At the material time the Organisation employed the complainant and three other typists in the Chinese unit: one acted as head of unit; another joined the staff in 1988; and a third typist, like the complainant, took up duty on 1 October 1990.

The chief of the Personnel Planning and Career Development Branch (P/PLAN) told the complainant at a meeting on 12 July 1993, which the chief of DACTYL also attended, that unless the Office found another assignment for him his appointment would expire at the scheduled date, 30 September. In a minute of 22 July the chief of P/PLAN confirmed for budgetary reasons the decision not to extend his contract and said that since Chinese was his only language the Office had no other post to offer him.

He objected in letters of 12 August 1993 to the Director of the Personnel Department and 20 August to the Director-General. On 25 August and 1 September he discussed his situation with the chief of P/PLAN.

In his performance appraisal for the period 1 April 1992 to 30 June 1993, completed on 7 September, the chief of DACTYL said:

> "Mr. Li Z. has been with us for almost three years. He is familiar with all aspects of work in the Chinese pool. He works conscientiously and carefully. So as to do well he often comes in early and leaves late. The quality and quantity of his work are very good, particularly in transcription. He is good at checking, can work without supervision and is always willing to help. ..."

In a letter to the Director-General of 8 September he protested that the decision not to extend his contract was "unfair".

By a letter of 24 September the Director of the Personnel Department informed him that the Director-General had decided to treat his letter of 20 August as a request for review under Article 13.1 of the Staff Regulations and the one of 8 September as a "complaint" under 13.2.

In a letter of 29 September he asked the Director-General to extend his contract by a few months on compassionate grounds. On 30 September, his last day under contract, he saw the Director of the Personnel Department, the chiefs of P/PLAN, PROTEXT and DACTYL and the staff counsellor and entreated them for an extension.

In a note of 3 October the head of the Chinese unit told the complainant that she had passed over some shortcomings in appraising the typist who had joined the unit in 1988 because "she was at a very critical juncture at the time as her contract awaited renewal and she was pregnant" and because "she should be given an opportunity to correct them and improve her performance"; moreover, the abolition of posts in the unit had not been mooted when the appraisal was completed.

The Director of the Personnel Department said in an undated letter he got on 2 November 1993 that the Director-General did not consider the workload of the Chinese unit to warrant extending his contract but was willing to consider "transitory measures" to help him to meet the costs of removal.

By a letter of 3 November 1993, which he impugns, the Director informed him that the Director-General had rejected his charge of "unfair" treatment.

B. The complainant submits that the decision not to extend his appointment is unfair in that it rests on considerations of seniority and not of competence. That is in breach of Article 4.2(a) of the Staff Regulations, which says that "the necessity to obtain staff of the highest standards of competence, efficiency and integrity" is "the paramount consideration" in filling vacancies.

In his submission the Administration's treatment of him was discriminatory, the chief of DACTYL having misrepresented the other typist's performance in 1992 to make sure she was "treated leniently". He failed to get an extension while the same colleague, though her post was to have been abolished, did get one. Lack of funds did not keep the Organisation from offering others in his branch fixed-term appointments. The refusal to extend his contract till the end of 1993 - despite a promise from the chief of PROTEXT so to extend the contract of anyone affected by retrenchment of staff - was "a sort of retaliation".

There were also procedural flaws. Having based his decision entirely on performance appraisals for the period from July 1991 to March 1992 the Director-General drew mistaken conclusions from the evidence. The Administration refused to take account of his last appraisal, for the period from April 1992 to June 1993, because it came out late and overlooked the "performance summary" that the supervisor of the unit wrote in May 1993 about the three typists in the Chinese unit on the pretext that it was an informal report. Instead of acting on a petition that he and two of his colleagues signed on 7 September 1993, the ILO rejected it out of hand.

He seeks the quashing of the Director-General's decision of 3 November 1993, reinstatement and awards of material and moral damages and costs.

C. In its reply the ILO contends that the complaint is devoid of merit.

The ILO says that it complied with Article 4.2. A comparison was made of the appraisal reports of three typists including the complainant. The report on the typist who had been recruited at the same time was better than the complainant's while the third, who had been recruited in 1988, had consistently good reports. What is more, the other two typists had followed language courses, whereas the complainant speaks only Chinese and needs an interpreter at meetings. Since 4.2(a) requires that "every official shall be required to possess a fully satisfactory knowledge of one of the working languages of the Organisation" the complainant's lack of a working language was a serious weakness.

If he thought the appraisal procedure was unfair he should have said as much in the space for his comments on the report form. The ILO did not have to take account of the "performance summary" or of the petition. The only official records of performance are in the appraisal reports provided for in Article 6.7 of the Staff Regulations and ILO circular 6/392 of 4 September 1987

Even if the Organisation had taken stock of his final appraisal report he would have fared no better than the typist he says got preferential treatment: it was only his second report, while she had had three "very satisfactory" ones.

The ILO contends that reinstatement is out of the question since non-renewal does not infringe any contractual right. Under Article 4.6(d) of the Staff Regulations a fixed-term appointment carries no expectancy of renewal or of conversion to another type of appointment. According to the case law non-renewal, if improper, will warrant an award of damages for loss of expectation, reinstatement being an exceptional remedy. There was nothing exceptional about the decision the complainant is objecting to: it was discretionary and shows no fatal flaws. In keeping with the principle known as "last in, first out" the post to be abolished had to be either the complainant's or the one held by the typist who joined the unit when he did. However commendable the complainant's performance may have been, his ignorance of the ILO's official languages was an "obvious" disadvantage.

D. In his rejoinder the complainant seeks to correct what he sees as factual mistakes in the Organisation's reply and enlarges on his pleas.

He has been studying English since 1991 and can now communicate in the language; but for the discussion of matters vital to his future it was only natural for him to seek the help of an interpreter. In any event circular 392 does not make "communication" the main yardstick of performance.

Article 6.7 of the Staff Regulations and circular 392 afford no grounds for neglecting his supervisor's "performance summary" and the petition. Besides, as the head of his unit acknowledged in the note dated 3 October 1993, the appraisal of one colleague's performance failed to reveal her shortcomings.

He points out that his last performance report was not his second one, as the ILO says, but his third and it was "much better" than his colleague's. Under Article 6.7.3 of the Staff Regulations the ILO had until 30 June 1993 to draw up his appraisal for 1992-93, i.e. before deciding whether to extend his appointment. Since the head of the Chinese unit was on leave the report was held up until late August. The ILO's refusal to take account of his performance over his last eighteen months is a gross breach of procedure.

The provisions of 4.6(d) on fixed-term appointments notwithstanding, Judgment 1317 (in re Amira) held that "a contract of service, even if for a fixed term, creates in law a relationship of employment ... and there may therefore be requirements or consequences that go beyond the bounds of the contract as such". So 4.6(d) does not afford adequate grounds for the impugned decision.

E. In its surrejoinder the ILO enlarges on its pleas. It acknowledges that the complainant's last report was his third but maintains that it caused him no injury by failing to take account of it since it did not rely on his colleagues' latest reports either.

CONSIDERATIONS:

1. The ILO employed the complainant in the Chinese unit of the Typing and Text-Processing Section of the International Labour Office from 1 October 1990 under a fixed-term appointment for two years. It extended his contract once, until 30 September 1993, and he is objecting to its refusal of further renewal.

2. At the material time the Chinese unit had four typists. One was a supervisor, Mrs. Liu. The other three, who were all at grade G.4 and held temporary appointments, were the complainant, Mrs. Li, who had been recruited in 1988, and Miss Xu, who had joined on 1 October 1990, the same day as the complainant. Mrs. Li and he are not related.

3. Cuts in the Organisation's Programme and Budget for the 1994-95 biennium entailed doing away with one post in the Chinese unit by the end of 1993.

4. Article 4.6(d) of the Staff Regulations of the Office states:

> "While a fixed-term appointment may be renewed, it shall carry no expectation of renewal or of conversion to another type of appointment, and shall terminate without

> prior notice on the termination date fixed in the contract of employment."

In keeping with practice, however, the chief of the Personnel Planning and Career Development Branch (P/PLAN) sent the complainant a minute dated 22 July 1993 giving two months' notice: because of budgetary "constraints" the ILO could not renew his contract, which would be ending on 30 September 1993, and attempts to re-deploy him had failed because he had no "language qualification other than Chinese". On 8 September 1993 he lodged an internal appeal with the Director-General against the non-renewal, but by a letter of 3 November the Director of the Personnel Department told him that the Director-General had rejected it. The Director explained that the decision not to extend his contract had been taken on comparison of appraisals of his performance and that of the other two typists and that seniority had not been "the primary criterion" in determining who was to be kept on. The complainant asks the Tribunal to quash that decision and seeks reinstatement, awards of damages for material and moral injury and costs.

5. In its reply the Organisation explains that in deciding which of the three appointments not to renew it took account of both performance and seniority. In choosing between the complainant and Miss Xu, who were of equal seniority, it preferred Miss Xu because her performance was better and she could also communicate to some extent in French. The complainant does not question that preference. The Organisation goes on to say that the reason why it preferred Mrs. Li to him was that, besides having greater seniority, she had good reports on performance and had from the beginning of her stint with the Organisation been following the English classes it provided. Not only was the appraisal of the complainant's performance less favourable, but he spoke only Chinese and on the many occasions when people other than Chinese met him there always had to be an interpreter.

6. The issue is whether the appraisal of the complainant's performance and comparison of it with Mrs. Li's were flawed.

7. The ILO made up its mind about their performance solely on comparison of reports for 1991-92. The complainant objects, first, that those reports failed to reflect actual performance; that the appraisal of Mrs. Li was wrong because the supervisor had deliberately withheld adverse remarks, as she confirmed in a note she sent him on 3 October 1993; and that the appraisal of his own work also failed to reflect his real performance although he had not questioned it at the time. His second objection is that the ILO refused to take into account a note headed "performance summary" which the supervisor of the three typists wrote about them in May 1993.

Thirdly, he contends that the Organisation overlooked the latest appraisal of his performance, for the period from 1 April 1992 to 30 June 1993, which he says was "much better" than Mrs. Li's.

8. According to the procedure for the appraisal of performance in the ILO an employee's supervisors comment at the end of the period under review, and the employee may contest their comments if he so wishes. Citing Article 6.7.1 of the Staff Regulations, which says that performance "shall be appraised" on a form prescribed by the Director-General, the ILO contends that the only criterion of performance is the performance appraisal reports which are prescribed in those Regulations, and which respect procedures intended to secure objectivity.

9. In reply to the complainant's argument that it overlooked the appraisal of him for 1992-93 the ILO contends that he suffered no injury because the reports on the other two typists for the same period were also discounted; in any event that appraisal would not have affected the comparison because there was no material difference between it and the previous one, his proficiency in languages being no better.

10. Although the ILO says that Mrs. Li had had three highly satisfactory appraisals and offers to submit the texts to the Tribunal, it does not expressly deny the complainant's assertion that his appraisal for 1992-93 was "much better" than Mrs. Li's for that period. The Organisation is indeed mistaken in claiming that the appraisal of his work in that period was no better than the two earlier ones. Whereas both the earlier ones mentioned areas in which improvement was needed and assessed his work as merely "good", the appraisal for 1992-93 mentioned no weakness and described his performance as "very good". It also spoke for the first time of good performance in many particular respects, such as knowledge of working procedures, a conscientious and careful approach, good time-keeping, the quality and quantity of output, and co-operativeness particularly in the testing of a "Chinese card" for the computer. It made no adverse comment about his English or efforts to learn it.

11. The complainant's contract was extended beyond 30 September 1992 in line with a recommendation in his report for the period from 1 July 1991 to 31 March 1992. It was not that report, but the appraisal of his performance over the next 15 months, that was most relevant to the decision taken in July 1993 not to renew his contract, whether that decision was based on appraisal of his performance in isolation or in comparison with that of others. By ignoring the latest appraisal the ILO overlooked improvements in his performance. Circular 6/392 of 4 September 1987 reaffirms that "the performance appraisal procedure plays a key role in the ILO's system of career

service and rewards", including the extension of fixed-term contracts; in the Organisation's own submission performance appraisals are the only criterion of performance; and Article 6.7.3 of the Staff Regulations provides for such appraisals on the completion of 9, 18, 33 and 45 months of service. The timing of appraisal ensures that when renewal is being considered an appraisal of performance in the immediately prior period will usually be available. The conclusion is that the Organisation's failure to have the appraisal of the complainant's performance in 1992-93 available when it decided not to renew his contract was a procedural flaw which had the effect of excluding an essential fact from consideration.

12. The reason why the appraisal was not then available was that his supervisor was on home leave and it was not completed until 7 September 1993, after her return. It is true that if the ILO had waited until the appraisal had been completed it could not have complied with its practice of giving two months' notice of non-renewal. But in the circumstances of this case that affords no excuse. After the complainant had lodged his internal appeal he pointed out to the Director-General that funds were available for the rest of 1993 and suggested extending his contract by a few months until a final decision was taken. Since the appraisal was available on 7 September 1993 the Organisation could have taken it into consideration; but it did not, and the Director-General rejected his appeal on 3 November 1993 without any reference to the appraisal. Since the failure to consider his appraisal caused him prejudice the impugned decision cannot stand.

13. A decision not to renew a fixed-term contract does not interfere with any contractual right but merely disappoints expectation of further employment. The complainant is not entitled to the exceptional relief of reinstatement but only to an award of damages, and the Tribunal sets the amount at 15,000 Swiss francs. It also awards him 1,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 3 November 1993 is quashed.
2. The Organisation shall pay the complainant 15,000 Swiss francs in damages.
3. It shall pay him 1,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re OFFERMAN Judgment 1352

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul-Peter Offerman against the European Patent Organisation (EPO) on 3 April 1993, the EPO's reply of 21 June, the complainant's rejoinder of 17 September and the Organisation's surrejoinder of 15 November 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 13, 106, 107 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman, joined the staff of the EPO at its office at The Hague on 1 February 1991 as an electrotechnician at grade B2. Under Article 13(1) of the Service Regulations his first six months of service were probationary, a report being due by the end of the fifth month.

On 16 July he signed without comment a probation report drawn up on 8 July. His reporting officer recommended confirming his appointment but said there was room for improvement "on punctuality and service" and quality of work. His countersigning officer recommended extending probation until 15 October 1991 and telling him that he was "not progressing satisfactorily".

By a letter of 23 July 1991 the head of the Personnel Department informed him that the President of the Office had decided to extend the probation period by two-and-a-half months as from 1 August 1991 and that confirmation of his appointment would depend on "improvements being noticed in your work".

The two reporting officers who signed his final report on 23 September recommended against confirmation on the grounds that he had not shown improvement and was lacking in "perceptivity, initiative and independence". The countersigning officer having endorsed their recommendation, the complainant protested in comments dated 1 October; he described "a superior" of his as "not able or willing" to solve problems in the department and announced his intention to appeal.

By a letter of 9 October 1991 he asked the President to confirm his appointment or treat his letter as an internal appeal under Articles 106 to 108 of the Service Regulations.

The head of the Personnel Department informed him in a letter of 15 October that the President had decided to dismiss him as from 16 October 1991 under Article 13(2).

In a letter of 11 November 1991 the Principal Director of Personnel conveyed to him the President's decision to refer his case to the Appeals Committee. In its report of 8 October 1992 the Committee recommended rejecting his appeal. By a letter of 7 January 1993, the impugned decision, the Director of Staff Policy notified to him the President's decision to endorse that recommendation.

B. The complainant submits that the President's decision was unlawful. He puts forward three pleas.

He argues first that there were fatal procedural flaws. Under Article 13(2) of the Service Regulations his first probation report was due not less than one month before expiry of probation, but he got the report just two weeks before. The Administration further infringed 13(2) by denying him time "for reflection" to write comments on the report.

His second plea is misuse of authority by the countersigning officer. Although the reporting officer favoured confirming his appointment, the countersigning officer recommended extending the probation period simply on the grounds that the six months prescribed in the Service Regulations were too short, not because of any exceptional circumstances or serious doubts warranting such treatment.

He contends, lastly, that by extending the probation period the President drew a mistaken conclusion from the evidence. He was wrong to rely on certain adverse comments by the reporting officer, whose general recommendation was in the complainant's favour, and to follow the recommendation of the countersigning officer. The copious criticism in the second report - of work covering less than two months - was designed merely to afford a basis for the decision not to confirm his appointment.

He seeks the quashing of the decision of 7 January 1993, confirmation of his appointment as from 1 August 1991 with payment of salary and entitlements up to the date of reinstatement, and awards of 50,000 guilders in moral damages and 3,000 guilders in costs.

C. In its reply the EPO submits that his complaint is devoid of merit insofar as it is directed against the decision of 15 October to dismiss him on 16 October 1991. Insofar as it challenges the President's decision of 23 July not to confirm his appointment as from 1 August 1991 it is irreceivable and, besides, without merit.

The EPO points out that since the complainant did not lodge a timely appeal against the decision of 23 July 1991 he has failed to exhaust the means of internal redress in keeping with Article VII(1) of the Tribunal's Statute. He neither commented on the recommendation in the first report to extend probation nor referred to it in his letter of 9 October 1991 appealing against dismissal. Indeed he first referred to the decision of 23 July 1991 in a note to the Appeals Committee dated "08.92" in reply to the statement from the Administration on his appeal.

In any event the decision to extend his probation was sound. Since any appointment would have been permanent the Administration had to make sure he could carry out his duties to his supervisors' satisfaction. The delay in issuing his first report was not detrimental to him and so is not a fatal flaw. He had ample time to comment on the report between 16 July 1991, when he received it, and the decision of 23 July.

Inasmuch as he did not make any effort to dispel the doubts expressed in the first report his second could but confirm that he was unfit for permanent appointment in category B. Had he taken seriously the Administration's earlier warnings would he have sacrificed two-and-a-half weeks on annual leave during the extended probation period?

Since the President of the Office did not act unlawfully, the complainant's claims are unfounded.

D. In his rejoinder the complainant observes that he expressly appealed in the letter of 9 October 1991 against the decision of 23 July, the only one adversely affecting him at the time. After setting out his objections to that decision he explained why he had delayed appealing against it until 9 October, a date well within the prescribed time limit.

He objects to his supervisors' failure to discuss his shortcomings before issuing the first report and accuses an official unfamiliar with his work of altering the favourable evaluation the reporting officer put in the second report. He alleges other flaws in the reporting procedure and describes his taking of annual leave as "normal and appropriate".

E. In its surrejoinder the EPO says there are no points in the rejoinder that alter its position. Though it could have objected that his internal appeal against dismissal was premature since he did not receive the decision to dismiss him until 15 October 1991, it pleads irreceivability only on the grounds of his belated challenge to the extension of probation. It rebuts his pleas on the merits and submits that his comments about a supervisor - who was acting on authority delegated by the countersigning officer - are libellous.

CONSIDERATIONS:

1. On joining the staff of the EPO at The Hague on 1 February 1991 as an electro-technician at grade B2 the complainant was put on probation. The period of probation was six months in accordance with Article 13(1) of the Service Regulations.

2. His supervisor and reporting officer was Mr. Vrugt, the head of Technical Services, and the "countersigning" officer was Mr. Minnoye, the Director of General Administration. Mr. Vrugt signed the complainant's first probation report on 8 July 1991 and Mr. Minnoye on 13 July. About his ability to perform his duties the report said under point II.2:

> "Seems to perform his duties in an adequate way. In case of handing over work to colleagues this has to be done more carefully. Could improve on punctuality and service. Seems to take certain things too lightly."

The comments in II.3 on the "quality and quantity of the work performed" were:

> "Quality is average, but certainly has to be improved. Quantity seems average."

and in point II.4 on "conduct at work":

> "Mr. Offerman appears to be a pleasant colleague. Seems to learn quickly. A little more attention should be given to punctuality and application in relation to the work."

Though Mr. Vrugt recommended confirming his appointment Mr. Minnoye said in comments under point III:

> "The execution and completion of technical tasks by Mr. Offerman can be quoted as good but within the short probationary period it is difficult to evaluate Mr. Offerman's capabilities to learn, adapt himself and respect all working procedures within the technical service, therefore I propose to extend the probationary period until 15/10/91."

On 16 July the complainant signed the report, saying that he had "no comments to make".

3. By a note dated 23 July the head of the Personnel Department informed the complainant of the decision by the President of the Office to "prolong your probation period by 2 1/2 months as of 1 August 1991" in accordance with Article 13(2) of the Regulations and explained that the confirmation of his appointment would "depend on improvements being noticed in [his] work, taking into consideration the remarks made by [his] superior at point II, paragraphs 2, 3 and 4" of the probation report.

4. Mr. Vrugt having since been transferred to another post, two other supervisors, Mrs. van der Steenhoven and Mr. van Houwelingen, were in turn in charge of Technical Services. They signed a final probation report on the complainant on 23 September 1991. Their detailed comments were unfavourable and they recommended against confirming his appointment. The complainant added undated "General comments" protesting against their evaluation, but Mr. Minnoye too, as countersigning officer, recommended on 25 September against confirmation saying:

> "Despite the fact that a chance was given during the prolongation of the probationary period, Mr. Offerman was not able to use this opportunity to improve his performance significantly."

5. The complainant thereupon appealed to the Appeals Committee; in its report of 8 October 1992 the Committee recommended rejection; the President accepted the recommendation; and the Director of Staff Policy so informed him by a letter of 7 January 1993, the decision he impugns.

6. The complainant contends:

first, that his appointment should have been confirmed at the end of six months and that the decision of 23 July 1991 to extend the period of probation was wrongful; and

secondly, that the extension was too short and came during the summer holidays, when his supervisors kept changing, and that the decision to terminate his appointment was wrongful.

The relief he seeks is:

(a) the quashing of the final decision of 7 January 1993;

(b) the confirmation of his appointment as a permanent employee as from 1 August 1991;

(c) payment in full of his remuneration from 1 August 1991 to the date of reinstatement;

(d) 50,000 guilders in moral damages; and

(e) 3,000 guilders in costs.

7. The Organisation submits that his objections to the decision of 23 July 1991 to extend his probation are irreceivable because they did not form part of his internal appeal, which in its view challenged the decision to dismiss him at the end of the extended period.

8. In his letter of 9 October 1991 to the President he protested against the evaluation of his career in the first probation report; he explained that the reason why he had not at the time appealed against the extension of probation was his awareness of "managerial problems in the technical service"; he sought confirmation of his appointment; and he said that if the President did not allow his claims his letter was to be treated as lodging an internal appeal. It was so treated. In his submissions to the Appeals Committee he made the same case as he does before the Tribunal. In particular he asked the Appeals Committee to recommend allowing his appeal against the

decision of 23 July 1991 not to confirm his appointment. In its report the Committee noted that the EPO had raised "no objection to the receivability" of the appeal and it went into the merits.

9. What was at issue before the Committee was the EPO's decision not to confirm the complainant's appointment, and he chose to object to the failure to confirm at the end of his first six months' probation and to the failure to appoint him at the end of the extended period. Since he filed his appeal within three months of the decision of 23 July 1991 and since he raised both those issues before the Committee, he is not barred before the Tribunal from basing his argument on the first probation report.

10. As he points out, he did not receive the text of that report one month before the end of the prescribed six months and he had no discussion with Mr. Vrugt as reporting officer before the report was drawn up. But the matter at issue is whether there was any fatal flaw in the essence of the decision, i.e. whether he suffered any injury. As the Tribunal held in Judgment 890 (in re Créchet) under 3:

> "The purpose of the Article 13 procedure is to elicit comments from both sides, the probationer being plainly entitled to be given a full explanation of the assessment of his work in sufficient time to enable him to make comments of his own before the President takes a decision.
>
> But article 13 does not take care of those two points. What it does is set a deadline, not for communicating the report to the official, though that is all that really matters, but just for making it. Late communication therefore will not make the decision unlawful unless the probationer suffers injury."

11. In this case the complainant chose not to make comments on the report and in any case, instead of being dismissed, was given another two-and-a-half months in which he might have shown his mettle. The Tribunal concludes that in the circumstances he suffered no actual injury either from the lack of prior discussion or from getting the text of the report on 16 July instead of 30 June. The conclusion is that the Organisation's failure to meet the deadline in Article 13(2) did not make unlawful the decision not to confirm his appointment.

12. The Tribunal has stated many times the limited grounds on which it may review the lawfulness of termination

where there is no fatal formal or procedural flaw. They are that there was a mistake of law or fact, that some essential fact was overlooked, that clearly mistaken conclusions were drawn from the evidence, or that there was abuse of authority. What is more, in the case of dismissal of a probationer the employer is to be allowed the widest discretion and the decision will be quashed only if the mistake or the illegality is especially serious or glaring: see, for example, Judgment 687 (in re Delangue) under 2.

13. The complainant alleges that the President drew mistaken conclusions from his first probation report in deciding to extend the period of probation in that he overlooked the favourable remarks in the appraisal; that the adverse comments by Mr. Vrugt were not all that serious since he recommended confirmation; that the countersigning officer, Mr. Minnoye, mentioned the difficulty of assessing him in a mere six months; and that he should not suffer for the shortness of probation.

14. It would have been justifiable to confirm the complainant's appointment at the end of the first six months only if his work had proved satisfactory in all respects. The report did not suggest that it was. Mr. Minnoye's remarks are not to be taken to mean, as the complainant implies, that in all cases a period of six months is too short for probation, but that it was too short in his case. Had his performance already proved satisfactory in all respects the six months would have been adequate. But because he still had doubts the countersigning officer refused to endorse the reporting officer's recommendation to confirm his appointment. That the two supervisors disagreed affords no reason for setting aside the decision by the President, who, with two diverging opinions before him, chose to follow the recommendation for extension. There are no grounds for saying that the President overlooked the good features of the report and paid heed only to the bad: the President had to evaluate the report as a whole, setting good against bad. His decision to extend the probation was an unobjectionable and indeed entirely reasonable response intended to enable the complainant to improve.

15. The complainant contends that Mr. Minnoye's recommendation for extension of his probation was an abuse of authority because it was not based on any adverse comment. In fact what Mr. Minnoye said cannot be interpreted as unqualified approval: he clearly thought that the complainant had not proved himself and required more time. His recommendation was no abuse of authority.

16. As to the second probation report signed on 23 September 1991, the complainant objects to its going into an "enormous amount of detail about the different aspects" of work he had done over a period of "less than two months and during a peak holiday period in which the supervisor of the complainant was constantly being changed".

17. One of the supervisors who signed that report was Mrs. van der Steenhoven. She had been his tutor in his first six months on probation and later his supervisor for fourteen working days. The other reporting officer was Mr. van Houwelingen, and he was the complainant's supervisor for ten working days before the report was made. So each of them had sufficient opportunity to see whether he had made efforts to improve his performance as assessed in his first probation report. The details of their observations serve to show that they were watching him closely in the period in which he came under their supervision. The time that each of them had - particularly Mrs. van der Steenhoven, since she already knew the complainant and his work - was quite adequate to enable them to form an opinion that the President of the Office might safely rely on. Nor is there any evidence before the Tribunal to suggest that any of their criticisms was made in bad faith and with the purpose - as the complainant contends - of "justifying the decision". The President therefore made no error in acting on their recommendation.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re LOUIS (No. 4)
(Application for review)

Judgment 1353

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Frantz Marceau Louis on 20 December 1993, and corrected on 5 February 1994, for review of Judgment 1263;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 8, paragraph 3, of the Rules of Court as in force up to 30 April 1994 and Article 7 of the Rules of the Tribunal as in force since 1 May 1994;

Having examined the written submissions;

CONSIDERATIONS:

1. Judgment 1263 of 14 July 1993 dismissed the complainant's third complaint. In that complaint he was challenging a decision that the United Nations Educational, Scientific and Cultural Organization (UNESCO) had taken on 15 June 1992 to reject his claims dated 27 April 1992 on the grounds that the Tribunal had already entertained them and the matter was res judicata. He now seeks review of that judgment.

2. The Tribunal has often stated its approach to applications of that kind. As it observed, for example in Judgments 442 (in re de Villegas No. 4) and 1309 (in re Ahmad No. 3), its judgments carry the authority of res judicata and are subject to review only in exceptional circumstances. Several pleas afford inadmissible grounds for review, such as allegations of errors of law or misappraisal of evidence; other pleas may be admissible provided they may have an effect on the Tribunal's decision, examples being failure to take account of some specific fact and a material error, i.e. a mistaken finding of fact that involves no value judgment and is therefore distinguishable from misappraisal of evidence.

3. The complainant alleges that certain facts "may have escaped the Tribunal's attention" and that the judgment therefore shows material errors.

4. His first plea is such error in a ruling in the judgment under 6. The Tribunal held that his claim to damages for UNESCO's failure to distribute circular 1474 was made for the first time, had not formed the subject of any prior appeal to the Director-General, and was therefore irreceivable because he had not exhausted the internal means of redress.

5. He does not say that he did lodge any such prior appeal. Instead he merely says that the Organization had not told him of the decision to apply the circular in 1986 and 1988. There is no call to determine in the context of review whether the circular was ever brought to his notice. All that need be said is that since he never lodged a prior appeal with the Director-General there is no material error.

6. Secondly, he challenges the statement in Judgment 1263 under 5 that the Tribunal had already taken up his claim to the quashing of his dismissal in Judgment 1131 of 3 July 1991 on his first complaint and the matter is therefore *res judicata*.

7. Again there is no mistake of fact. The plea fails because the main claim in his first complaint - the quashing of his dismissal - was allowed and the decision was set aside.

8. His next objection is to the finding in Judgment 1263 under 3 that he had failed to lodge a prior appeal claiming payment of three months' pay in lieu of notice. He cites several items of evidence which he says show such a prior claim and submits that the Tribunal overlooked a material fact.

9. This plea too fails. Judgment 1263 observed that he was not denying failure to file an internal appeal but just asserting that the refusal to grant him the three months' pay in lieu of notice was discriminatory and unlawful. Moreover, the submissions on his third complaint show that in his internal appeal against dismissal he was objecting to lack of notice, whereas the claim in that complaint was to an amount corresponding to the three months. That is a claim that never formed part of any prior appeal.

10. He objects, lastly, to the statement in Judgment 1263 under 5 that claims it numbered (2) and (3) in reference to his complaint of 28 September 1992 are the same as claims 11.5 and 11.13(v) in his first complaint.

11. Even if he were right the plea would amount to a mistake of law, and that is not an admissible plea for review.

12. The conclusion is that all his claims must be rejected as "clearly irreceivable" both under Article 8(3) of the Rules of Court that were in force when he filed his complaint and under Article 7 of the Rules in force since 1 May 1994.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda E. Razafindralambo P. Pescatore

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re GUYEN

Judgment 1354

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antoine Guyen against the European Organization for Nuclear Research (CERN) on 1 June 1993, CERN's reply of 27 September, the complainant's rejoinder of 30 November 1993 and the Organization's surrejoinder of 3 February 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rule 2.03 and Regulations R II 2.05 and R II 2.07 of the CERN Staff Rules and Regulations and paragraphs 4, 9 and 14 of the Organization's "Instructions for the designation of career paths to present staff members";

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1937, joined CERN on 1 March 1975 as a laboratory technician at grade 7, step 0. On 1 March 1978 CERN gave him an indefinite appointment. It granted him a step increase every year and the highest step - 13 - in his grade in 1988. There he stayed until 1 July 1991, when he was promoted to grade 8, step 5, on reclassification of his post. He is now at step 7 in grade 8.

On 1 August 1991 CERN introduced a new scheme for career advancement whereby every established staff member follows a "career path" comprising several grades and steps. Advancement within the career path depends on the assessment of performance in yearly reports.

The scheme was to come in in several stages. At the end of the first the Personnel Division put the complainant provisionally on career path V. At the next, on the basis of the definition of the new career paths and "Instructions for the designation of career paths to present staff members", the leader of the complainant's division confirmed after consulting the leader of his group that his duties matched career path V.

At an interview which the Instructions required and which took place on 5 November 1991 his group leader told him of the division leader's decision. The complainant said he disagreed.

By a letter of 14 February 1992 the leader of the Personnel Division, with the Director-General's approval, informed the complainant that he was putting him on path V from 1 March 1992.

By a letter of 7 April 1992 to the Director-General the complainant filed an internal appeal with the Joint Advisory Appeals Board against the decision of 14 February and asked for assignment to path VI and "professional rehabilitation".

According to a report dated October 1992 the Board endorsed the Administration's decision to assign him to path V.

By a letter of 3 March 1993, the impugned decision, the Director-General told the complainant that on the Board's recommendation he was rejecting his claim to assignment to path VI.

B. The complainant contends first that CERN treated him unfairly. Although the reports on his performance had been good it did not promote him from grade 7 to grade 8 until 16 years after recruitment, whereas most officials are promoted after only 8 years' service. Nor did he get any personal salary increase before promotion to grade 8.

Secondly, he considers that CERN failed to take proper account of paragraph 4 of the Instructions, which stipulates that if it is to serve as an incentive the career path must be carefully chosen. If the choice is seen to be unfair, arbitrary or unlikely to offer reasonable prospects to dedicated and hardworking staff it may prove a serious disincentive. The complainant cites the case of another official, with the same duties and experience as he, who is on a grade 9 post and path VI. He asks to see the statistics of staff advancement in order to compare his own situation with that of other officials.

Thirdly, he asserts that his outlook is "uncertain and unpromising" since all he can look forward to is a proposal for placement in another career path or seven years in career path V until he reaches grade 8 step 13. Although in the latter case he might get exceptional advancement in grade and that may sound "alluring", such advancement is not such a good thing towards the end of a career since it brings a step increase only every other year.

Lastly, he submits that the Organization discriminated against him because of his age, which was 55. Although paragraph 14 of the Instructions says that grade 8 staff are to be put provisionally on path VI "where that grade was attained at or below age 38", CERN stated in the internal proceedings that it took account of age only on provisional placement. If so the complainant, who was on a grade 8 post at the material time, should have been put ipso facto on path VI.

He asks the Tribunal to quash the Director-General's decision of 3 March 1993, order CERN to review his assignment and put him on path VI, and grant him "professional rehabilitation" in the form of ten annual step increments.

C. CERN replies that the complainant has failed to show breach of his contract of appointment or the material rules or to explain how it has misapplied paragraph 4 of the Instructions, which in any case serves only for "general consideration", not as a directly applicable rule.

He adduces not a shred of evidence to show that he has the same duties or qualifies for the same career path as the other official.

How can he describe his outlook as "uncertain and unpromising"? Quite apart from the possibility of changing career paths under Rule II 2.03 and Regulation R II 2.07, path V offers the prospect of advancement in his present grade by eight steps and then of the exceptional advancement in grade allowed under Regulation R II 2.05.

In line with the Instructions the criterion of age was applied only in the provisional determination of the complainant's career path. At the later stages CERN took the view that he failed to qualify for path VI.

His main claim and his claim to "professional rehabilitation" are groundless.

D. In his rejoinder the complainant recounts incidents that occurred in 1987 as evidence in support of allegations of personal prejudice on the part of his supervisors in his first 12 years' service. Discrimination against him delayed promotion until 1991. Had his career gone unimpeded he would by now have advanced beyond grade 8 and the Organization would have had to put him on path VI.

The introduction of the new career system amounts to variation of his contract of appointment, disrupts his conditions of service and so warrants compensation. He presses his pleas.

E. In its surrejoinder the Organization maintains that putting the complainant on path V squares with the rules. Citing Judgment 111 (in re Jurado Nos. 12 and 13) it observes that a complainant may not "refer to the courts in a single complaint two or more different decisions having no connection with each other". The complainant's claim to "professional rehabilitation", which he rests on incidents prior to the impugned decision, is therefore irreceivable. Furthermore, since he shows no link between the damages he seeks under this head and CERN's allegedly unfair treatment of him, what he is claiming is not quantifiable.

He offers no evidence of any discrepancy between his performance and his grade and has never lodged an internal appeal against his grade.

Lastly, the new scheme for advancement has not harmed his interests but greatly broadened his career prospects.

CONSIDERATIONS:

1. The complainant joined CERN on 1 March 1975 at the age of thirty-eight as a laboratory technician (electronics) at grade 7. On 1 March 1978 he got an indefinite appointment. In 1991 he was promoted to grade 8, step 5, and because of annual step increments he is now at step 7. On 1 August 1991 CERN brought in a new system of advancement by "career path". The Personnel Division put the complainant in category 3 and provisionally on career path V. His own division having endorsed that career path, the leader of the Personnel Division proposed putting him on it as from 1 March 1992 and, with the Director-General's agreement, informed him in a letter of 14 February 1992 that it had been so decided. He lodged an appeal but on the recommendation of the Joint Advisory Appeals Board the Director-General rejected it on 3 March 1993. That is the decision he is challenging.

Receivability

2. CERN pleads that the complaint is irreceivable insofar as the complainant is claiming "professional rehabilitation". In its submission that claim and the decision to put him on path V do not have the same basis. What he wants is

damages for the allegedly unfair treatment of him throughout much of his career. That, says the Organization, is a separate claim and one that should have formed the subject of a separate decision.

3. The plea fails. The impugned decision of 3 March 1993 was a reply to the internal appeal the complainant made on 7 April 1992. There were two heads of claim in that appeal. One was about assignment to path V and the other about professional rehabilitation. In rejecting the appeal the Director-General not only endorsed the Board's recommendation about the matter of his career path but also by implication rejected his claim to "professional rehabilitation". Though the impugned decision answers two separate claims it is still a single decision and he may challenge it in a single complaint.

The merits

4. He puts forward several pleas in support of his claim to the quashing of the decision to put him on path V. In his submission CERN misapplied the criteria in the rules; it was in breach of the principle of equal treatment; it based the decision solely on the criterion of age; it took account only of his grade - 8 - in choosing his career path and disregarded the good reports on his performance; and the procedure it followed was not adversarial.

5. As to the application of the prescribed criteria, he is wrong to claim path VI on the strength of his present duties and acknowledged potential. He fails to show any fatal flaw in the decision. On 3 October 1991 the Organization issued Instructions for the designation of career paths to present staff members. Paragraph 9 of the Instructions sets out the stages of the procedure. Professional abilities are to be recognised in the Director-General's exercise of his discretion to determine the right career path and that decision is subject only to limited review by the Tribunal. The complainant fails to identify any flaw which there might have been at some stage in the prescribed procedure. He merely speaks in vague and general terms of misapplication of the criteria. His plea under this head therefore fails.

6. In support of his plea of breach of equal treatment he cites only one case, though he says there must be many others he is unaware of. That there may be such other cases is mere idle speculation. As for the case he does cite, the official is at grade 9, whereas the complainant's grade is 8. Since the principle of equality means treating alike only those who are in like case, his plea fails.

7. Also mistaken is his argument that his age was the only reason for putting him on a lower career path than he deserved. His age counted only for the purpose of provisional determination of his career path. Section 14 of the Instructions of 3 October 1991 reads:

> "Staff in Categories 3 and 5b will be placed in career paths IV, V or VI according to the following instructions:
>
> Provisional designation:
>
> ...
>
> Career path V ...:
>
> ...
>
> - Staff in job grade 8 where that grade was attained after age 38 ...".

It is common ground that the complainant was in category 3 and had been in grade 8 since 1 July 1991, when he was well over the age of 38. Besides there is no evidence to suggest that after the divisions involved in the various stages of the procedure had agreed to the provisional career path age carried any weight in the Director-General's final decision.

8. He further objects to CERN's relying on his grade 8 to put him on path V and disregarding his "altogether flattering references" and "fine" performance reports. The plea is irreceivable since it amounts to challenging his promotion to grade 8, a decision he has never demurred at in an internal appeal and which has therefore become final.

9. He submits that the procedure for determining his career path ought to have been adversarial. That is a stricture in general terms that fails to square with his statement in his rejoinder that he submitted "comments" to his division "objecting to the provisional determination" of career path. Moreover, the evidence shows that he saw his group leader on 5 November 1991. In any event both his internal appeal and the present proceedings have afforded him ample opportunity to plead his case. So there is no question of any breach of his right to due process.

10. Lastly, his claim to what he calls "professional rehabilitation" rests mainly on his allegation that promotion was long in coming because a former group leader blocked his career for years. The claim fails for the same reasons as those set out in 8 above. He may not now raise any objection to a promotion which he has not challenged by timely internal appeal.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re SUPRAPTO Judgment 1355

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Martosuharjo Suprapto against the Universal Postal Union (UPU) on 5 August 1993 and corrected on 8 September, the UPU's reply of 15 October, the complainant's rejoinder of 24 November and the Union's surrejoinder of 22 December 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulations 1.2, 4.1, 4.3, 4.7, 4.8 and 4.9 and Rules 111.3.1 and 113.3.2 of the Staff Regulations and Rules of the International Bureau of the UPU;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Indonesia who was born in 1940, joined the International Bureau of the UPU on 1 January 1983 as a first secretary at grade P.3. He was assigned to Section L (Finance).

On 9 May 1989 he applied for a vacancy as assistant head of Section H (Technical Cooperation Administration) at grade P.4 which the Union had announced in office notice 47/189 of 1 May 1989. The holder of a post as assistant head of Section E (Logistics), graded P.3/P.4, was transferred to the post in Section H and the applications were therefore considered for the post vacated in Section E.

According to the minutes of a meeting held on 9 October 1989 the Appointment and Promotion Committee (APC) put the complainant third on the short-list it recommended to the Director-General, who chose the second candidate, Mrs. Júdice Glória.

Mrs. Glória having resigned, the post was again put up for internal competition and the complainant again applied on

4 April 1991. This time the APC put him at the top of its short-list, but the Director-General preferred Mr. Arne Johnsen, who was second, and transferred him to the post on 1 September 1991.

Mr. Johnsen was transferred to another department as from 1 November 1992 and the post was advertised as vacant yet again. Although the APC again ranked the complainant first the Director-General appointed the candidate in second place, Mrs. Meretta de Saez.

By a letter of 30 October 1992 the Director-General informed the complainant that his application for the post of assistant head of Section E had been unsuccessful.

Having written on 2 November to the Director-General seeking an explanation of the reasons for the decision, the complainant asked him in a letter of 26 November to reconsider it in accordance with Rule 111.3.1.

By a letter of 15 December the Deputy Director-General confirmed the Director-General's decision.

By a letter of 21 December the complainant lodged an appeal with the Joint Appeals Committee under Rule 113.3.2.

In its report of 3 May 1993 the Committee recommended rejecting his claims but suggested that before rejecting the first candidate on a list the Director-General should consult the chairman of the Appointment and Promotion Committee.

By a letter of 11 May 1993 - the impugned decision - the Director-General informed the complainant of the final rejection of his claims.

B. The complainant has three pleas.

Citing Judgment 1235 (in re Der Hovsépian) he submits first that the Director-General should have stated the reasons for his decision not to appoint him "so that the Tribunal may properly exercise its power of review". By failing to do so the Director-General was in breach of a general principle of law.

Secondly, the impugned decision was the result of an error of law. As was held in Judgment 670 (in re Bambinelli No. 2), when the Director-General disregards the recommendation of an appointment committee his decision must be quashed if it shows an error of law or prejudice. Although the Director-General may at discretion base his decision on criteria, such as geographical distribution or the advancement of women, which the APC does not apply he may not just ignore its recommendations; else it would serve no purpose at all.

The complainant's third plea is that the decision of 11 May 1993 shows prejudice against him. The Director-General has thrice preferred someone less experienced or lower in the short-list.

Lastly, he "regrets" the Union's submitting to the Joint Appeals Committee three reports which he had not seen on APC proceedings.

He asks the Tribunal to quash the decision of 11 May 1993 or, failing that, grant him personal promotion; to order the Union to pay him an amount equal to the difference between his salary and the salary of the P.4 post as assistant head of Section E as from 1 November 1992 and until it promotes him to grade P.4; and to award him moral damages and costs.

C. In its reply the Union rejects the complainant's pleas as groundless.

It explains that on the strength of secret ratings the APC draws up a short-list from which in line with Regulation 4.1 the Director-General chooses the candidate who shows "the highest standards of efficiency, competence and integrity". In 1991 he exercised his discretion in choosing Mr. Johnsen as assistant head of Section E. Though less experienced than the complainant he was fully qualified for the job. Besides, Regulation 4.3 says that seniority is a determining factor only when other qualifications are equal. Mrs. de Saez, who won in 1992, is at least as well qualified as the complainant and has been in the same grade for longer. The Director-General chose her from the APC's short-list and took account of other criteria such as the advancement of women. So he did not misuse his discretion.

The Union submits that the case ruled on in Judgment 670 is not wholly relevant: in the organisation that was defending that case the Appointment and Promotion Committee recommended only one candidate to the Director-General; so it was really the committee that made the final choice.

Lastly, the UPU points out that the reports on the APC's proceedings were appended to the Director-General's submissions to the Joint Appeals Committee, of which the complainant got a copy. If they were missing he should have asked for them at once, and he may not now allege a procedural flaw on the grounds that he did not get them.

D. In his rejoinder the complainant contends that Mr. Johnsen's "short stint" as assistant head of Section E was against the UPU's interests and merely blocked his own advancement.

In his submission Regulation 4.9 empowers the APC to act independently and it has all the information it needs to identify the suitable applicants. If the Director-General was quite free to choose between the three on the short-list why should it bother to rank them?

Any criterion the Director-General may apply over and above the Committee's must be admissible in law. But the one he relies on - the advancement of women - is not, since Regulation 4.7 says that "selection of staff members shall be made without distinction as to ... sex ...".

The complainant maintains that he was not given the APC's reports but admits that the procedural flaw is not fatal.

E. In its surrejoinder the Union points out that according to Regulation 1.2 "staff members shall be subject to the authority of the Director-General, who may assign them, in accordance with their qualifications, to any of the activities or offices of the Bureau".

The Joint Appeals Committee's suggestion for consulting the APC has no basis in law and there is no such consultation in any other international organisation. Ever since it was established in 1973, the APC's function has been to advise the Director-General, not to take decisions in his stead. The main purpose of its voting system is to determine the three best candidates. The order of preference is the outcome of the voting but is not binding on the Director-General.

CONSIDERATIONS:

1. The complainant joined the Union in 1983 as a first secretary at grade P.3 in Section L. He has thrice applied for a post as assistant head of Section E. In October 1989 the Appointment and Promotion Committee put him third on its short-list but the candidate ranked second was appointed. That official having left, he came top of the Committee's list in May 1991, but again the second candidate won. The new appointee being transferred to another unit, the complainant applied a third time and again came first in the Committee's list; but the Director-General yet again preferred the next candidate on the short-list, who was a woman. Having failed

to get the Director-General to change his mind, the complainant filed an internal appeal against the decision of 30 October 1992 not to appoint him assistant head of Section E. By a decision of 11 May 1993 the Director-General followed the Joint Appeals Committee's recommendation and upheld the earlier decision. That is the decision now impugned.

2. The receivability of the complaint is not at issue.

3. The complainant's pleas are in substance as follows. In his submission there was not due process before the Joint Appeals Committee. The Director-General failed to substantiate the impugned decision, and although he may have stated some of the reasons for it in the internal appeal proceedings they are sketchy and contrary to general principles of law. In any event the Director-General erred in law in taking the view that he might disregard the Appointment and Promotion Committee's "decisions". And the Director-General's repeated refusal to appoint the complainant shows personal prejudice that is fatal to the impugned decision.

4. What then are the material principles to be derived from the Staff Regulations of the UPU and the case law? Under Regulation 4.8 the Director-General may fill any vacancy by promotion except a vacancy at grade D.2. Regulation 4.3 reads:

> "Without prejudice to the recruitment of fresh talent at all grades, full account shall be taken in making appointments to vacant posts of the qualifications and experience which persons already in the service of the Union may possess. Seniority shall be a determining factor only when other qualifications are equal".

And Regulation 4.9 provides for an Appointment and Promotion Committee to advise the Director-General on all appointments and promotions to vacancies. According to the case law - especially Judgment 1235 (in re Der Hovsépian) on a complaint from another UPU official - the Director-General is not bound by the Appointment and Promotion Committee's recommendations and in particular need not appoint the candidate the Committee has put first. In the exercise of discretion he must ensure that his choice is not tainted with any mistake of law or fact and, to allow the Tribunal to exercise its power of review, he must state the reasons for his decision.

5. The complainant's first plea is breach of due process before the Joint Appeals Committee, and hence his argument is that the records of the Appointment and Promotion Committee's proceedings on 9 October 1989, 21 May 1991 and 2 October 1992 were made available to the Appeals Committee but not to him.

6. The plea fails. The alleged formal flaw is one that he himself describes in his rejoinder as "unimportant". The records were appended to the Director-General's submissions to the Appeals Committee and those submissions actually mentioned them. The complainant was sent a copy of the Director-General's submissions and if the reports were not in fact appended he had only to ask for them. Besides, the UPU has produced them in the present proceedings. So there has been no breach of due process.

7. His second plea, that the decision was unexplained, has two aspects to it: the UPU failed to tell him the reasons for not promoting him, and the reasons the Director-General did later offer are vague and at variance with the Regulations.

8. On the first point the Director-General's letter of 30 October 1992 telling him he had not been successful made no mention of any reasons, and neither did the letters of 10 and 15 December rejecting his request for review. But there is no rule or principle of law that requires the Director-General to state in so many words just why he has turned someone down for promotion or appointment. What matters is that, if the official asks, the reasons must be revealed. Otherwise the Tribunal may not exercise its power of review and determine whether the reasons are lawful and the decision sound.

9. Both before the Joint Appeals Committee and the Tribunal the UPU has explained the reasons why the Director-General decided against appointing the first candidate on the Appointment and Promotion Committee's list. They are not very clearly stated: the Union says that the successful candidate "was as well qualified as the complainant but had greater seniority within their grade" and that the Director-General took account of "such general considerations as his duty to enhance the contribution women make at the top levels of international service". As the complainant points out, Regulation 4.7 bars discrimination on grounds of sex in staff matters. So any promotion wholly or even mainly based on considerations of sex would unquestionably be unlawful. But the evidence is that the decisive factor in choosing between the first two candidates on the Appointment and Promotion Committee's list was seniority, their professional qualifications being much the same. The successful candidate had served nearly six years more than the complainant in the Union and over one year more at grade P.3. He does not seriously challenge her merit and, their qualifications being comparable, it was lawful for the Union to apply the test of seniority. His second plea fails.

10. So does his third one, that the Director-General erred in law by assuming that he was empowered to disregard the Appointment and Promotion Committee's "decisions". What the Committee does is advise, not decide, and the Director-General simply exercised his discretion in choosing between the candidates on its short-list. Although, as has been said, he must exercise such discretion lawfully he is not bound by the Committee's ranking of candidates.

11. The complainant's last argument is that rejecting him three times for the post he wants suggests that he is the victim of personal prejudice. Again the plea cannot succeed. He made no challenge at the time to the appointments made in 1989 and 1991, and they are beyond challenge now. Understandably disappointed though he may be at twice losing the post to a candidate ranked second to himself, there is no evidence in the file of any personal prejudice to warrant a finding of misuse of authority.

12. The conclusion is that the complainant's claims must be disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re TAR

Judgment 1356

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Zoltan John Tar against the International Telecommunication Union (ITU) on 14 May 1993, the ITU's reply of 29 October 1993, the complainant's rejoinder of 10 January 1994 and the Union's surrejoinder of 10 February 1994;

Considering the application to intervene filed by Mr. Yann Saunders;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Regulation 3.5 and Rule 11.1.1.2 a) of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. ITU Staff Regulation 3.5 reads:

> "a) In order to adjust for cost-of-living variations in Geneva in relation to a base index, there shall be added to the net base salary of a staff member in the Professional category and above a post adjustment the amount of which shall be determined by multiplying 1 per cent of that net base salary by a multiplier reflecting the number of points by which the multiplier index for the duty station concerned exceeds the base index.
>
> b) The post-adjustment index for Geneva and the corresponding multiplier shall be determined at regular intervals by the International Civil Service Commission."

In August 1980 the complainant, an Australian, joined the staff of the ITU in Geneva and was assigned to the International Advisory Committee on Telegraphy and Telephony, which is known by the initials of its title in French, CCITT. He now holds a post in the CCITT as counsellor at grade P.5.

On a proposal the Secretary-General had put to it in May 1992 the ITU's Administrative Council adopted on 8 July 1992 a resolution on conditions of employment expressing concern that salary scales in the common system of the United Nations organisations, to which the ITU belongs, failed to reflect differences in working hours at different duty stations and calling on the General Assembly of the United Nations and the International Civil Service Commission (ICSC) to look into the matter. In another resolution of even date the Council decided to set up a "consultative group" to examine employment issues and recommend action within the common system.

From Service Order No. 78 of 12 November 1992 the complainant learned that the figure of the post-adjustment multiplier for that month for Geneva was 92.2. In a memorandum of 17 December he asked the Secretary-General to review the decision announced in the service order and claimed material and moral damages; he also asked that in the event of rejection he be relieved of the obligation to go to the Appeal Board. By a letter of 17 February 1993, the impugned decision, the Secretary-General rejected his request for review but agreed to his putting his case straight to the Tribunal.

In its report of 21 May 1993 to the Administrative Council the consultative group said it hoped that the ICSC would resolve what it called the "apparent contradiction between equalization of purchasing power and hours of work".

On 28 June 1993, at its 38th session, the Commission decided not to change practice as to working hours in the common system.

B. The complainant submits that the decision to set the post-adjustment multiplier for November 1992 at 92.2 is unlawful because it overlooked differences in working hours between New York and Geneva. He has three main pleas.

He argues first that the Secretary-General neglected an essential fact. To be valid, comparison of purchasing power at duty stations must have regard to staff whose conditions of service are the same. But working hours are 11.8 per cent longer in Geneva than in New York. So the impugned decision is at odds with the whole purpose of post adjustment, which the ICSC says is to give the pay of all Professional category staff the same purchasing power whatever their duty station may be.

His second plea is breach of equal treatment. Because of inflation the purchasing power of staff pay in Geneva fell by about a quarter from 1984 to 1992 as against staff pay in New York. Staff in the General Service category, however, have not fared so badly: whereas the highest level of their pay comes within the range of pay corresponding to grade P.2 in New York it rose in Geneva from the equivalent of P.2, step 4, in 1984 to that of P.4, step 4, in 1992.

The complainant contends, lastly, that the Union has infringed his right to "equal pay for equal work" under Article 23(2) of the Universal Declaration of Human Rights. Though the ITU has complied with the "form" of the Staff Regulations the "substance" discriminates against the Professional category of staff in Geneva and is in breach of the terms of his appointment.

He seeks an 11.8 per cent increase in salary as from November 1992; back-payment of 113,280 Swiss francs for unremunerated service since August 1984; and 50,000 francs in moral damages. He also wants the Union to restore the relative value of his salary by offsetting the disproportionate rise since 1984 in the value of salary paid to other categories of staff at the Union.

C. In its reply the ITU submits that the complaint is irreceivable. At issue are long-established practices such as differences in working hours between Geneva and New York and an alleged loss in the purchasing power of pay since 1984. The fact that the complainant was an intervener in a complaint on which the Tribunal ruled in Judgment 826 (in re Araman and Sala) on 5 June 1987 shows that he was aware then of the disparity he is now alleging. So by any reckoning the time limit for appeal ran out years ago.

The Union argues that his complaint is, besides, devoid of merit.

As he acknowledges, the Administration has complied with the material rules. What he is objecting to are decisions of the Commission. Although the Union would have welcomed a new approach from the Commission to problems common to several duty stations, it had to abide by the rules whether or not they linked the post-adjustment allowance to working hours.

The ITU denies discrimination. Work like the complainant's does not lend itself to quantification in terms of working hours. So he is wrong to take the principle of equal pay for equal work to mean equal pay for an equal number of working hours. What the principle means is equal pay for work of equal value. In any event the principle has an effective safeguard at the ITU in the job-classification system.

In line with the "Noblemaire" principle pay of staff in the Professional category is based on levels of pay of United States federal civil servants, and according to the "Fleming" principle pay of staff in the General Service category is based on the best prevailing local conditions. That has led to a big overlap in pay between the two categories at some duty stations. That the Union has sought a remedy is plain from the work of the consultative group it set up.

Insofar as the complainant is not alleging breach of the Staff Regulations or Staff Rules there is no challengeable decision. His acceptance of the ITU's offer of appointment implied that he had read and accepted the rules; so his plea of breach of his terms of employment is groundless.

D. The complainant rejoins that his complaint is receivable and well-founded. His case turns on a recurrent breach which has nothing to do with the grievance on which the Tribunal ruled on in Judgment 826.

He presses his pleas on the merits and accuses the Union of seeking refuge in the rules of the common system. In his view it has observed only the letter, not the spirit of Noblemaire. Its infringement of that and other principles is a breach of acquired rights. Instead of bowing to the common system the Union should obey higher principles of equity, good faith and equal treatment and avoid causing its staff undue injury.

The complainant asks the Tribunal to declare that the difference in working hours between the United Nations in New York and the ITU in Geneva offends against the basic guarantee of equal purchasing power throughout the common system and to order the ITU to afford a remedy by increasing the pay of Professional category staff in Geneva or lowering their working hours or granting such other redress as may restore "equality of conditions leading to equivalence of purchasing power".

E. In its surrejoinder the ITU observes that the complainant has not put forward any new material argument in the rejoinder which it has not already answered. His new claims are, it contends, contrary to the case law.

CONSIDERATIONS:

1. The background to the case is as follows. In May 1992 the Secretary-General of the Union put to its Administrative Council the question of the difference in working hours between duty stations, a point which the pay scales of Professional category staff do not take into account. The Council adopted a resolution, No. 1024, at its 47th Session in June and July 1992. Among other things, the resolution set up a "consultative group" to "study staff issues in order to recommend to the Council specific actions, in conformity with the Common System". The group submitted to the Council a report dated 21 May 1993. Under the heading "Working Hours" the group said it "welcomed the commitment" of the representative of the International Civil Service Commission "to complete the study of this question before September 1993"; noted that "hours of work were not uniform in the Common System as they varied from duty station to duty station"; and expressed the hope that the Commission would "specifically address this apparent contradiction between equalization of purchasing power and hours of work". The upshot was, however, a decision by the Commission at its 38th Session, in July and August 1993, "to maintain the current common system practices with regard to working hours and to inform the General Assembly accordingly".

Receivability

2. The complainant, an ITU official, is impugning a decision confirming the "multiplier" that was applied in reckoning the post-adjustment allowance for the purpose of determining his own entitlements for November 1992.

3. The ITU is challenging the receivability of the complaint on the grounds that it is -

> "based on situations, which were either established practices long before the date of the appeal (such as differences in working hours between the comparator and the complainant's duty station; alleged losses in purchasing power between Geneva and New York; alleged discrimination against Professional Staff as compared to the General Services staff) or were of a hypothetical character at the time of lodging the appeal (net remuneration increases for levels D.1 and D.2, ungraded officials and General Services category)."

4. Rule 11.1.1.2 a) of the ITU Staff Rules reads:

> "A staff member who, under the terms of Regulation 11.1, wishes to appeal against an administrative decision, shall as a first step address a letter to the Secretary-General with a copy to the head of the organ in which he serves, requesting that the administrative decision be reviewed. Such a letter must be sent within six weeks from the time the staff member received notification of the decision in writing."

The complainant lodged such appeal within the six weeks allowed under Rule 11.1.1.2 a), challenging Service Order No. 78 dated 12 November 1992. In his reply of 17 February 1993 the Secretary-General refused to review the matter of the multiplier applied to the post adjustment and to pay the complainant the retroactive increase of 11.8 per cent he had claimed and authorised him to appeal directly to the Tribunal. That is the final decision he is impugning and he filed his complaint on 14 May 1993, within the time limit in Article VII(2) of the Tribunal's Statute. The conclusion is that his complaint is receivable.

The merits

5. The decision originally challenged by the complainant arose out of Service Order No. 78, which set the multiplier to be applied in the reckoning of the post adjustment for the Professional category of Union staff in Geneva in November 1992. The figure is calculated to ensure that the pay of staff in the Professional category should have equal purchasing power whatever their duty station may be. The material rule is Regulation 3.5 a) of the ITU Staff Regulations, which is set out in A above.

6. The complainant acknowledges that the Regulation was duly observed in the determination of the multiplier for November 1992. He is not alleging any flaw in the method of reckoning the multiplier but is using the matter as a pretext for objecting to one feature of the terms of his employment, namely that he has to work a week of forty hours against the thirty-five required of Professional category staff of the common system who are stationed in New York. He is accordingly seeking, among other things, an increase of 11.8 per cent in his pay to compensate for his longer working hours. His request for review under Rule 11.1.1.2 a) arose out of the determination of working hours in the Union and the common system.

7. What the complainant is really challenging is the pay scales applicable to the category of staff to which he belongs. That is a matter radically different from challenging the multiplier, which is just the result of an arithmetical exercise that varies with the prevailing rates of exchange between the dollar - the currency of account in the common system - and other currencies and which is supposed to give pay the same purchasing power in New York and elsewhere.

8. The conclusion is that in refusing the complainant's claims the Union has acted in accordance with its own rules and with its obligations as a member of the common system and under the Statute of the International Civil Service Commission. Those claims are nothing more than an attempt to challenge the pay scales under the guise of attacking the multiplier.

9. Since the complainant's main claim fails, so too do all the others.

10. Since the complaint fails on the foregoing grounds, so too does the application to intervene.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Michel Gentot
Michel Gentot

A.B. Gardner
A.B. Gardner

**Registry's translation,
the French text alone
being authoritative.**

SEVENTY-SEVENTH SESSION

In re CASSAIGNAU (No. 2) Judgment 1357

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 June 1993 and corrected on 14 and 17 June, Eurocontrol's reply of 21 September 1993, the complainant's rejoinder of 4 January 1994 and the Agency's surrejoinder of 24 March 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 25, 30, 31 and 92 of the Staff Regulations governing officials of the Agency, Article 7 of Rule No. 4 concerning the procedure for grade promotion, office notice 42/77 of 14 June 1977 and office notice 10/89 of 22 May 1989 as amended on 30 January 1990;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman born in 1943, is an expert at grade A5 at Eurocontrol's Institute of Air Navigation Services in Luxembourg.

On 2 March 1992 the Agency issued under number LX-92-AO/046 a "vacancy notice/notice of competition", the former for serving staff members and the latter for inside and outside applicants and those sponsored by national administrations. The purpose was to fill a post for a principal expert at grade A4.

On 21 April the complainant applied in keeping with section 2.1 of office notice 42/77 of 14 June 1977. The Director General decided as the "appointing authority" that none of the inside applicants met the stated requirements. The

Director of the Institute told them so at a meeting on 12 May 1992 and a few days later saw the complainant again to talk of his career prospects.

In a minute of 2 September 1992 the complainant asked the Director General for formal confirmation of the rejection of his candidature. This he got, after seeing the Director General on 2 October, from the Director of Personnel in a letter sent on 7 October on the Director General's behalf.

In September 1992 the staff were told of plans for reform of the Institute which were to take effect on 1 January 1993. Three departments, L1, L2 and L3, which had been sharing responsibility for training and maintenance, were to be merged into two new units, the Training Division and the Systems Bureau. More particularly, the duties set out in notice 46 were not after all to be given to a principal expert at grade A4 but to someone at a lower grade subordinate to such an expert.

So on 16 October 1992 Eurocontrol issued a new notice, under number LX-92-AO/143, announcing a vacancy for an expert at grade "A5/6/7". In letters of 5 November 1992 the head of Division PF1 informed the applicants that the Director General had decided to stop the process of recruitment announced in notice 46. By a letter of 10 November 1992 to the Director General the complainant applied for transfer to the post announced in notice 143. But the Director General preferred an outside applicant, Mr. Michel Pistre.

On 14 January 1993 the complainant lodged a "complaint" under Article 92(2) of the Staff Regulations against the decision of 7 October 1992 rejecting him in the competition announced in notice 46. In a letter of 3 March 1993, the impugned decision, the Director of Personnel told him that the Director General had rejected his "complaint" as irreceivable.

B. The complainant has three pleas.

His first is that the Agency was in breach of Articles 30(2) and 31 of the Staff Regulations and of office notice 10/89 as amended on 30 January 1990. Those texts read as follows:

> Article 30(2):
>
> "For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.

> The appointing authority shall decide which of these candidates to appoint to the vacant posts.
>
> In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."
>
> Article 31:
>
> "In the event of the application of the provisions of Article 30 above not enabling the Agency to obtain, by promotion or transfer or appeal for applications from the National Administrations, a sufficient number of qualified staff to fill its needs, it may proceed to direct recruitment by means of competitions, selection being made according to a procedure similar to that described in Article 30. ..."
>
> In 10/89 the Director General says:
>
> "In future, therefore a separate specialist selection board will be appointed for each A grade vacancy. Generally, the board will be chaired by Director, Personnel and Finance and will also include a staff representative and two nominees of the Director in whose area the vacancy arises."

The complainant points out that no selection board was set up to consider the inside applicants and no staff representative was appointed. That offended against the staff's right to open and objective decision-making.

His second plea is that the Director General's failure to explain the rejection of his application was in breach of the second paragraph of Article 25 of the Staff Regulations, which reads:

> "Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

The complainant observes that the Director of the Institute is not the appointing authority and that that authority, in giving him notice of the decision on 7 October 1992, failed to explain why he was not up to requirements. Citing Judgment 1223 (in re Kirstetter No. 2) he submits that an organisation's duty to state the reasons for a decision is a basic principle of the international civil service.

Thirdly, he alleges obvious misappraisal of the facts inasmuch as he met all of the requirements in notice 46.

He wants the quashing of the decision of 3 March 1993 confirming the rejection of his application for the vacancy announced in notice 46, a new process of recruitment to fill the vacancy properly and an award of costs.

C. In its reply Eurocontrol submits that his complaint is irreceivable because it shows no cause of action. By the time he filed it on 6 June 1993 notice 46 had already been withdrawn and replaced by another, No. 143, which he knew about and which indeed prompted him to apply. In any event his claim to a new recruitment exercise is irreceivable because it was not part of his "complaint" of 14 January 1993. And the Tribunal may not issue orders to the Agency.

In subsidiary argument on the merits Eurocontrol denies breach of Articles 30 and 31 of the Staff Regulations. Under Article 7 of Rule No. 4 on the procedure for promotion in grade* the allotment of vacancies between inside and outside applicants is a matter of management at the Director General's discretion. According to paragraph 2.1.5 of office notice 42/77 the promotion board meets only when the Director General has allowed for the filling of a vacancy by promotion. But here it was impossible to fill the post by promotion, there was no need to convene a promotion board and the vacancy had been abolished anyway. Office notice 10/89 is about boards for filling vacancies by competition, not by promotion; so it is not material.

Citing the Tribunal's case law and that of the Court of Justice of the European Communities, the Organisation says that it is not bound to give reasons for refusing to promote staff: to do so might harm their career. But the Director of the Institute, who was of the same mind as the Director General, did discuss the matter several times with the complainant.

Eurocontrol denies, lastly, the charge of misappraisal: notice 46 was addressed to air traffic controllers whereas the complainant is an engineer by training and experience and was plainly not fit for the post.

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* The article reads:

"The Director General shall determine the maximum number of officials per grade and budgetary section to be entered in the promotion lists."

D. In his rejoinder the complainant enlarges on his pleas.

In his submission consistent precedent has it that the Director General's exercise of discretion is fettered and an official may ask the Tribunal to review any refusal to appoint him to a vacancy.

The whole purpose of the new vacancy notice was the unlawful recruitment of Mr. Pistre, who could not be appointed at grade A4. The downgrading of the post, of which the complainant got notice only on the rejection of his application of 3 March 1993, was a new fact and something he may challenge directly before the Tribunal.

In its reply the Agency disregards the principles affirmed in Judgment 1223. Engineering was a requisite for the post announced in notice 46, and the Director General is wrong to say the complainant was not qualified for it when Mr. Pistre too has a degree in engineering.

E. In its surrejoinder Eurocontrol insists that the complaint is irreceivable because it discloses no cause of action, notice 46 having been withdrawn and replaced. The complainant's claim to a new recruitment exercise to fill the post at grade A4, which was not part of the internal appeal, is also irreceivable.

Eurocontrol presses its pleas on the merits.

On the strength of Mr. Pistre's personal history the Organisation contends that he was fitter for the post than the complainant, who is so keen to get promotion as to care not a jot what he would be doing or whether he could do it.

CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services in Luxembourg. He is challenging his rejection for a post as principal expert at grade A4 announced in "vacancy notice/notice of competition" LX-92-AO/046 of 2 March 1992.

2. The material facts may be summed up as follows. The holder of the post announced in notice 46 was to perform new tasks required of Eurocontrol under the European Air Traffic Control Harmonisation and Integration Programme and encourage the use and development of teaching methods and materials for

the training of air traffic control staff, the aim being uniformity in member States. Since the incumbent was to be working independently the post was a senior one and graded A4.

3. In keeping with practice at Eurocontrol the process of selection was to be in two stages: first, in response to the "vacancy notice" and according to the purely administrative procedure provided for in paragraph 2.1.2 of office notice 42/77, serving staff might apply for appointment to the post by transfer or promotion; secondly, "the notice of competition" admitted to the selection board procedure prescribed in Articles 30 and 31 of the Staff Regulations anyone sponsored by a national administration, outside applicants and serving staff who sought appointment by promotion or transfer from one category to another.

4. The complainant's supervisors told him orally in May 1992 that he had been unsuccessful. In a minute of 2 September 1991 he asked the Agency to confirm that in writing and state the reasons. The Director of Personnel answered in a letter of 7 October 1992 that comparison with the other inside applicants had shown him not to have all the stated requirements for the advertised post; indeed none of the other inside applicants had been appointed; the Director of the Institute had given him the main reasons when they had met; and it was not the custom to convey them in writing.

5. On 14 January 1993 the complainant lodged a "complaint" against the decision under Article 92 of the Staff Regulations. In a letter of 3 March 1993 the Director of Personnel notified rejection; explained that the Director General had meanwhile decided not to go ahead with the process of selection for the post advertised in notice 46; said that notice 46 was replaced with "vacancy notice/notice of competition" LX-92-A0/143, which redefined the post and put it at a lower level, A5/6/7; and pointed out that cancelling the earlier notice made null and void the rejection he was objecting to in his "complaint".

6. The complainant is seeking the quashing of that final decision. His three pleas are breach of the procedural rules on promotion; failure to substantiate the decision; and an obvious mistake in assessing his qualifications for the original post. He wants the procedure announced in notice 46 to resume so that he may compete properly.

7. The Agency's main plea is that the complaint is irreceivable because it shows no cause of action. Its answers to the complainant's case are subsidiary.

8. Eurocontrol's submissions, and particularly its surrejoinder, show that by May 1992 it had decided once and for all to reject the complainant and it began the "competition"

phase on 26 May. The selection board it set up considered 28 applicants and in a report of 11 June short-listed three of them as fit for the post of principal expert at grade A4. First in the list was Mr. Michel Pistre, whom the French national administration was sponsoring.

9. Eurocontrol explains that at the time - in the second half of 1992 - it was reforming the Institute and so it came to drop notice 46 and replace it with notice 143, which it issued on 16 October 1992. Notice 143 put up for competition a post at grade A5/6/7 that was designed to fit better into the Institute's new structure. In the Organisation's submission the "complaint" of 14 January 1993 was therefore about a post that had ceased to exist on 16 October 1992, the date of issue of notice 143.

10. Notice 46 was still valid in May 1992, when the complainant was given information by word of mouth, on 2 September 1992, when he asked for written confirmation and explanation, and on 7 October 1992, when the Director of Personnel replied. Eurocontrol did not then tell him in writing it had dropped the procedure announced in that notice. And since notice 143 was about another post, at different grades and with different duties, it was not obvious that the issue of notice 143 put an end ipso facto to the procedure announced in notice 46. Only by his letter of 3 March 1993 did the Director of Personnel inform the complainant that in the exercise of his discretion the Director General had indeed decided to cancel the first notice.

11. The Organisation is free to withdraw a notice of vacancy at any time, even when, as in this case, the process of selection has gone quite far. The conclusion is that the complainant's internal appeal disclosed no cause of action at the time of filing and that his complaint must fail for the same reason, there being no need to entertain his arguments on the merits.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re CASSAIGNAU (No. 3)

Judgment 1358

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 10 August 1993, Eurocontrol's reply of 18 November 1993, the complainant's rejoinder of 1 February 1994 and the Agency's surrejoinder of 22 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 30 and 92 of the Staff Regulations governing officials of the Agency;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As is stated under A in Judgment 1357 (in re Cassaignau No. 2) also delivered this day, the complainant is a grade A5 expert in Eurocontrol's Institute of Air Navigation Services at Luxembourg.

In September 1992 there began reforms of the Institute. By a notice of reassignment dated 22 December 1992 the Director General informed the Institute's staff of the new structure and of their place in it: from 1 January 1993 three departments which had been sharing responsibility for training and maintenance - known as L1, L2 and L3 - were to make up two new units, the Training Division and the Systems Bureau. The notice said that the former head of L2, Mr. J. Watson, who was a principal expert at grade A4, was to go to the Systems Bureau but it did not explain what he was to be doing there. The complainant was to go, still at grade A5, to the Training Division's subdivision for training policy.

In a notice also dated 22 December 1992 the Director of the Institute informed staff that the head of L3, Mr. J. Sondt, another principal expert at grade A4, was to retire on 1 March 1993 and that Mr. Watson would be taking over as head of the Systems Bureau as from 1 January 1993.

On 26 March 1993 the complainant challenged "the decision to appoint" Mr. Watson as head of the Bureau, saying he had not got notice of it until 8 January 1993. By a decision of 7 May 1993, which he is impugning, the Director General rejected that internal "complaint" as time-barred and disclosing no cause of action.

B. The complainant observes, first, that in the notice of reassignment dated 22 December 1992 the Director General merely announced Mr. Watson's move to the Systems Bureau without saying he was to be head. It was not the Director General as appointing authority, but the Director of the Institute, who on the same day gave staff news of that appointment. The Director General offers no evidence of the date of the decision to make Mr. Watson head of the Bureau or of the date at which the complainant got notice of it. So Eurocontrol was wrong to plead the time bar against his internal appeal.

His second plea is breach of the procedure for filling vacancies and in particular of Article 30(2) of the Staff Regulations which reads as follows:

> "For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.
>
> The appointing authority shall decide which of these candidates to appoint to the vacant posts.
>
> In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

In the complainant's submission rule-makers and case law alike acknowledge that international civil servants have a "right to career advancement", a basic principle that fetters an organisation's discretion in filling vacancies. So Eurocontrol has a duty to inform staff of any vacancies and to convene a selection board to recommend transfer or promotion. Here it failed both to issue a notice of vacancy and to consider any applicant but Mr. Watson. His appointment to the more responsible post, which was in breach of the rules cited above, shows flagrant misappraisal of the evidence, the worse for his having neither the qualifications nor the experience required.

The complainant seeks the quashing of the decision of 7 May 1993 confirming Mr. Watson's appointment as from 1 January 1993 as head of the Systems Bureau; the resumption of the process of selection for the post in keeping with the Staff Regulations; and costs.

C. In its reply Eurocontrol submits that the complaint is irreceivable on two counts.

First, Article 92(2) of the Staff Regulations says that a "complaint" must be lodged within three months of the date of publication of any measure "of a general nature". In this case the three months started on 22 December 1992, when Eurocontrol issued the decision, not on 8 January 1993, when the complainant says he got notice of it. Since he did not file his "complaint" until 26 March 1993 it was time-barred and he has therefore failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

Eurocontrol's second objection is that Mr. Watson's move to the Bureau was neither promotion nor transfer within the meaning of the Staff Regulations but just a matter of internal organisation that did not affect the complainant adversely.

On the merits the Organisation points out that career advancement is governed by specific provisions of the Staff Regulations, not by the abstract notions the complainant is relying on. For him to win promotion to A4 there would have had to be a vacancy within the meaning of the Staff Regulations. But the notice of 22 December, far from creating a new post, was confined to mere reorganisation. Mr. Watson kept the same budgetary post and the same grade - A4 - even though his duties were somewhat changed. The new Systems Bureau is not a division. The complainant, who had a lower grade, could not have competed with Mr Watson, who, moreoever, had the experience his new duties required.

D. In his rejoinder the complainant maintains that his complaint was filed in time against the individual decision of 7 May 1993 confirming Mr. Watson's appointment as head of the Systems Bureau. Eurocontrol never gave him notice of the decision to appoint Mr. Watson nor, so far as he knows, has it ever published that decision. The notice of 22 December 1992 from the Director of the Institute has no legal force since the Director is not the appointing authority. Though the notice of reassignment of even date did come from the appointing authority it was provisional and was not "an act adversely affecting him".

The Institute's new organisation chart and the Director's minute of July 1992 show that the Bureau is to become a division. So Mr. Watson was indeed transferred to a new post and was taking over from Mr. Sondt, though the Administration did not so much as issue a notice of vacancy or convene a selection board. That was unlawful.

Inasmuch as the complainant was a "head of section" before the reforms it was unfair to take responsibility away from him, especially when his latest performance appraisal says he is fit for promotion to A4.

E. In its surrejoinder the Organisation maintains that the complaint is irreceivable: moving Mr. Watson was part of the general decision of 22 December 1992, not an individual decision altering the complainant's position in law. His "complaint", which was filed on 26 March 1993 - over three months after Eurocontrol had issued the general decision - was therefore out of time. In any event, though entitled to challenge his own reassignment, he might not object to someone else's.

Mr. Watson's reassignment was, the Agency repeats, neither promotion nor transfer and the complainant may not demand a process of selection to fill a post that is not vacant. Not until Mr. Sondt actually retired, on 1 May 1993, was there a vacant post for a principal expert at the Institute, and the Administration announced it on 27 March 1993 in notice LX-93-AT/091. At the time of Mr. Watson's reassignment there were no vacant posts at grade A4. So the complainant is wrong to object to what was merely a question of internal organisation.

CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services at Luxembourg. He is challenging the appointment of Mr. J. Watson as head of the Systems Bureau that reforms of the Institute engendered.

2. The reforms took effect on 1 January 1993. They consisted in the merger of three training departments into two units, a Training Division and a Systems Bureau, and in reassignment of staff, each with the same post as before, within the new structure. A general notice of reassignment dated 22 December 1992 so informed the officials affected.

3. One effect of the reforms was to put the complainant, still at grade A5, in a subdivision of the new Training Division. The head of the new Systems Bureau was Mr. Watson, an A4 official who had been in charge of one of the old training departments.

4. The complainant argues that the Administration should have declared the post as head of the Bureau vacant and applied the ad hoc procedure prescribed in the Staff Regulations for filling it so that he might have stood a chance of promotion.

5. Eurocontrol objects first that the complaint is irreceivable because his internal "complaint" was time-barred: he filed it on 26 March 1993, three days late, against a decision announced on 22 December 1992. Moreover, says Eurocontrol, there was no act that adversely affected him since what he is objecting to, his own reassignment and that of Mr. Watson, were merely transfers of budgetary posts and did not involve creating new ones or filling any vacancies. So, it submits, there was no question of transfer or promotion within the meaning of the Staff Regulations.

6. The issue of receivability turns on the substantive one the complainant has raised. Whether he filed his internal appeal in time and whether there was any act that affected him adversely are questions that hinge on the thrust of the impugned decision in law. Should the reforms of the Institute have entailed the issue of vacancy notices and the process of selection the Staff Regulations prescribe?

7. On that score the Organisation is quite right. As was said in 2 above, the reforms it introduced on 1 January 1993 consisted in a reorganisation by means of reassignment of staff together with their posts in the context of a new structure but without the creation of any new posts. The reforms may have altered the position of some in the hierarchy and their duties but, being brought about by transfer of their posts, did not affect their status under the Staff Regulations.

8. So the complainant is mistaken in pleading that the Agency should have held a competition to fill the vacancy as head of the Systems Bureau.

9. The conclusion is that the complainant, who was reassigned with due regard to his rights under the Staff Regulations, shows no cause of action in objecting to his own position, let alone to the appointment of someone else as head of the new Bureau.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re CASSAIGNAU (No. 4) Judgment 1359

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Bernard Cassaignau against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 6 September 1993 and corrected on 23 September, Eurocontrol's reply of 15 December 1993, the complainant's rejoinder of 22 February 1994 and the Organisation's surrejoinder of 3 May 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 25, 26, 30, 31, 32 and 45 of the Staff Regulations governing officials of the Agency, office notice 42/77 of 14 June 1977 and office notice 10/89 of 22 May 1989 as amended on 30 January 1990;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts of relevance to this case appear under A in Judgment 1357 delivered this day on the complainant's second complaint.

On 16 October 1992 the Agency's Institute of Air Navigation Services in Luxembourg issued a "vacancy notice/notice of competition", No. LX-92-AO/143. That notice replaced an earlier one of 2 March 1992, No. LX-92-AO/046, which had advertised a post at grade A4, and it was for a post as an expert at grade "A5/6/7".

The complainant, a grade A5 official, had applied unsuccessfully for the A4 post announced in notice 46. On 21 November 1992 he applied for transfer to the A5 post. But Eurocontrol found none of the inside candidates suitable and began the competition procedure on 2 December. The Selection Board met on 8 December 1992 and put four of the seven applicants on a short-list. Mr. Michel Pistre, who was at the top of the short-list, had been sponsored by the French administration. He was appointed to the post of expert at grade A5, step 1, on 1 April 1993.

By a letter of 25 February 1993 the Director of the Institute had informed the complainant on the Director General's behalf that his application had been turned down. On 8 April the complainant lodged an appeal but the Director rejected it in a letter of 4 June. That is the decision he challenges.

B. The complainant cites first the provisions he relies on in his second complaint and other articles of the Staff Regulations.

Referring to the pleadings on a case before the Court of Justice of the European Communities and to Judgment 1223 (in re Kirstetter No. 2), he submits that when filling a post, even by transfer, the Organisation must compare the merits of all applicants. In his view the only exception is in Article 32 and it affects only officials at grades A1 and A2.

Secondly, he contends that the impugned decision is flawed with obvious misappraisal of the facts since he does have all the qualifications notice 143 required.

Thirdly, the appointing authority infringed the second paragraph of Article 25 of the Staff Regulations by failing to state the reasons for its rejection of his application. That paragraph reads as follows:

> "Any decision relating to a specific individual which is taken under the Staff Regulations shall at once be communicated in writing to the official concerned. Any decision adversely affecting an official shall state the reasons on which it is based."

The complainant says that had his services proved unsatisfactory the Director General should, according to Article 26 of the Regulations, have said so in a written report and put it in his personal file. But he failed to do so. The complainant has no inkling of what his shortcomings may be, particularly since his last staff report, written on 14 September 1991, was good and his supervisor has never expressed reservations about him.

He asks the Tribunal to set aside both the rejection of his application for the post announced in notice 143 and Mr. Pistre's appointment to that post, order the Agency to carry out the selection process properly, grant him one ECU in token moral damages, and award him costs.

C. In its reply the Agency invites the Tribunal to consider whether the complainant has any cause of action, his position in law being unaffected by the rejection of his application for transfer, and whether his complaint is therefore irreceivable.

On the merits it denies breach of the Staff Regulations. None of the complainant's pleas is sound: the provisions of office notice 10/89 concern only selection boards for competitions; Judgment 1223 is about a case of promotion and the case before the Court of the European Communities about rules that apply only to the Communities. The material provisions are in office notice 42/77, which the complainant barely mentions.

Citing the case law, Eurocontrol contends that not every decision has to be substantiated. In any case the complainant knew the reasons why his application was turned down; they were explained at length in the decision of 4 June 1993.

Lastly, the Agency denies misappraisal of the facts. The staff report mentioned by the complainant is immaterial since it refers to duties other than those of the post in question. His latest report, which covers 1991-93, does contain criticism of him and he has never commented on it. It reflects his supervisor's opinion. There was therefore no reason to write another report for his personal file. Article 26 of the Regulations requires that only documents about an official's "administrative status" be put in that file.

D. In his rejoinder the complainant presses his pleas. He points out that Judgment 1223 ruled that Eurocontrol might not plead office notice 42/77 to secure release from its obligation under Article 30 of the Regulations to appoint a selection board. So it was wrong to appoint Mr. Pistre to the post announced in notice 143, no independent body having met beforehand.

Only afterwards did the Agency seek his supervisor's opinion, and his report for 1991-93 says, among other things, that he was "a very competent expert, able to perform duties on principal expert level", i.e. at grade A4.

Lastly, he denies that the case law releases the Agency from its obligation to account for decisions: it must make sure they are clear and objective.

E. In its surrejoinder the Agency contends that the complainant has no cause of action. It submits that his application for the vacant post was no more than a "wish to change duties", for which the Regulations prescribe no procedure. So the Director General had no reason to consult any independent body and his choice was governed solely by the Organisation's own interests, which demanded not appointing the complainant.

Judgment 1223 is irrelevant - maintains Eurocontrol - because unlike the complainant Mr. Kirstetter was alleging breach of office notice 42/77. In this case the procedure that notice prescribes was properly followed.

Neither the complainant's qualifications nor his experience met the requirements of the vacant post and there was no misappraisal of the facts. There is nothing in the complainant's latest report to suggest that he is fit for any vacant post, whatever it may be.

Lastly, the Organisation maintains that it did account properly for the impugned decision.

CONSIDERATIONS:

1. Eurocontrol employs the complainant as an expert at grade A5 in the Training Division of its Institute of Air Navigation Services in Luxembourg. A "vacancy notice/notice of competition", No. LX-92-AO/143, issued on 16 October 1992 advertised a post for an expert. The complainant applied, was rejected and is challenging his rejection. The notice is much the same as notice 46, which forms the subject of Judgment 1357, also delivered this day, on Mr. Cassaignau's second complaint save that notice 143 is about a post at grade A5/6/7 subordinate to a group leader.

2. On learning of his rejection for the post advertised in notice 46 the complainant applied for transfer to the vacancy announced in notice 143. Again he was unsuccessful, as the Director General told him by a minute of 25 February 1993. The minute said that his application had been "carefully considered" but he "did not meet all the requirements".

3. On 8 April 1993 he lodged an internal "complaint" seeking reversal of his rejection and challenging the appointment of Mr. Michel Pistre, a candidate sponsored by the French administration who had since been put on the post. In that "complaint" he said that Eurocontrol had failed to observe his right under Articles 30 and 31 of the Staff Regulations to have his application for transfer put to a selection board. He cited, among other texts, Judgment 1223.

4. The answer came in a fully reasoned letter of 4 June 1993 from the Director of Personnel. The complainant thereupon filed this case with the Tribunal, and he has three pleas: flaws in the process of selection, an obvious mistake in rating his qualifications, and failure to account for the decision.

5. Eurocontrol questions the receivability of the complaint in its reply. In its surrejoinder it actually contends that the complainant has no cause of action. It produces a page of its yearbook for 1993 which shows the complainant and Mr. Pistre together at the same grade and in the same sub-division. It argues that the appointment he wanted would have meant neither promotion nor transfer but a mere "change in duties", and for that there is no procedure laid down in the Staff Regulations. In its submission he therefore had no interest in securing the post he claims, let alone in ousting Mr. Pistre.

6. Eurocontrol has argued the issue at a point at which the complainant has not had the opportunity of replying. But the answer to the plea is that Eurocontrol is bound by the terms of notice 143 and the Tribunal will rule accordingly. The notice says that "Agency staff governed by the Staff Regulations who meet the requirements laid down in Office Notice No. 42/77, para. 2.1.2, are eligible to apply". Paragraph 2.1.2 says that those officials, among others, whose grade is the same as that of the vacancy to be filled may apply. The complainant plainly qualified thereunder. Since he has chosen to apply for the vacancy announced in the notice the Organisation may not object ex post facto that he lacks a cause of action on the grounds that he has after all ended up in the same sub-division and with the same grade as the preferred applicant.

7. So whatever his intent may have been and however he may compare with the other applicants the complainant qualified under the wording of the notice and was entitled as a Eurocontrol official to have his application considered and assessed by a process that complied with the rules. As has been shown, it was not, and the breach of his rightful interest affords grounds for this complaint.

8. The complainant sees breach of due process in the Organisation's failure to comply with the Staff Regulations, to be precise, with Articles 30 and 31. He says that yet again the Agency eliminated the inside applicants at the first stage before holding the competition in which a selection board is supposed to compare the inside, national and outside applicants on merit. Though Judgment 1223 declared that approach unlawful, Eurocontrol is still applying a method of selection that offends against the interests of serving staff.

9. Eurocontrol retorts that the two inside applicants had been rated earlier by the Director General with advice from the Director of the Institute, who knew both of them well. It was then - says the defendant - that the complainant was dropped for the reasons he had already been given in the process started by the issue of notice 46; so there seemed to be no need to explain the reasons to him again. The Organisation thereupon started the competition and the upshot was the appointment of Mr. Pistre.

10. Eurocontrol maintains that the whole process of selection complied with office notice 42/77, the "linchpin" of the procedure for filling vacancies. To its mind Judgment 1223, which is about promotion, is irrelevant to this case, which is about transfer, i.e. a mere change of duties at the same grade.

11. The Agency has in the complainant's cases made much of the "teleological" construction to be put on the Staff Regulations. But the ultimate purpose of the process the Regulations prescribe is to get staff of the highest standard who are fit to carry out their duties in full independence and in the common interests of the Organisation's membership. That is why it is quite proper for the Staff Regulations to allow recruitment from national administrations and elsewhere outside the Organisation besides providing for the career advancement of serving staff. More particularly, there is no denying the benefits of free flow of staff and sound concertation between Agency and national administrations.

12. Yet the conflicts of interest inherent in the process of selection demand strict observance of the stipulations that the Regulations lay down for filling posts. And one consistent requirement is the appointment of a selection board that may consider all applicants - whether inside, outside or from some national administration - who qualify under one and the same notice of vacancy. As was said in Judgment 1223, that formal requirement affords every applicant a basic safeguard of open and objective decision-making, and it holds good whether the applicant wants promotion, transfer or a change of category. Judgment 1223 further ruled in 27 that office notice 42/77, which embodies the distinction that Eurocontrol has consistently drawn between "notice of vacancy" and "notice of competition" for one and the same post, is at odds with Articles 30, 31 and 45 of the Staff Regulations insofar as it fails to provide for any selection board to consider inside applicants.

13. The conclusion is that the procedure Eurocontrol followed in accordance with the office notice and in breach of Articles 30, 31 and 45 was unlawful on account of the very ratio of notice 143. So the resulting decisions - the rejection of the complainant's application and Mr. Pistre's appointment to the advertised post - cannot stand.

14. The case must therefore be sent back to the Organisation for resumption of the selection procedure in keeping with the rules and without prejudice to any category of applicant eligible under the notice.

15. Eurocontrol may of course take steps to ensure that the unit continues to function in the meantime and to protect Mr. Pistre from any injury he might suffer for the quashing of an appointment he accepted in good faith.

16. Since the complainant has succeeded he is entitled to costs, and the amount is set at 100,000 Belgian francs.

DECISION:

For the above reasons,

1. The Tribunal sets aside both the decision of 4 June 1993 confirming the rejection of the complainant's application for the post announced in vacancy notice/notice of competition LX-92-AO/143 and the appointment of Mr. Michel Pistre to the post.
2. The case is sent back to Eurocontrol.
3. Eurocontrol shall pay the complainant 100,000 Belgian francs in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re CARRETTI (No. 5)

Judgment 1360

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Miss Giuliana Carretti against the Food and Agriculture Organization of the United Nations (FAO) on 8 July 1993, the FAO's reply of 1 October, the complainant's rejoinder of 31 December 1993 and the Organization's surrejoinder of 22 March 1994;

Considering Articles II, paragraphs 5 and 6, and VII, paragraphs 1 and 3, of the Statute of the Tribunal, Article 301.151 of Annex III to the FAO Staff Regulations, FAO Staff Rules 302.9034, 303.113 and 303.1311, and FAO Manual paragraphs 308.411, 311.44, 314.221, 314.222, 314.714, 323.512 and 374.41;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career is summed up under A in Judgment 1162, which dismissed her first complaint. In that complaint she asked to be given a stable position after serving the FAO for many years in which she had had several reassignments. As was said in that judgment, the Organization created a temporary post for her at grade G.5 in a division known as GIL. It created the post at the end of November 1991 as from 1 October 1991 and described it as a step towards the "final solution to her placement". She took the view that it did not match her qualifications and was an "imposition" and filed an application for review, which Judgment 1294 dismissed. The duration of the post was extended several times and she was still holding it at the material time.

By a memorandum of 22 December 1992 sent through the Director of the Personnel Division the Director of GIL addressed her a warning about her attitude to work and gave her two months in which to show that she was able to work satisfactorily and get on well with fellow staff. On 15 January 1993 he sent her a second warning. By a memorandum of 19 January 1993 to the Director of Personnel she challenged the warning of 22 December 1992 as unfounded and grossly libellous. On 11 February 1993 she supplied a medical certificate and applied for three months' sick leave as from 8 February.

By a memorandum of 20 April 1993 the Director of Personnel notified to her a decision to dismiss her, on the Director of GIL's recommendation, on grounds of unsatisfactory service under paragraph 314.222 of the FAO Manual; the termination was to take effect at 8 May 1993, when her sick leave was to end, and she was to be paid compensation under Staff Rule 302.9034. By a letter of 21 April to the Director of Personnel she acknowledged receipt of the memorandum and challenged the contents.

On 30 April she produced a second medical certificate and applied for extension of sick leave from 28 April to 31 July. By a telegram of 19 May the head of the Medical Service informed her that on 27 May she was to undergo a medical examination on FAO premises, that her sick leave was extended only to 26 May and that any further extension would depend on the findings of the examination. By a telegram of 25 May the Director of Personnel reminded her of her appointment for examination on the next day but one and pointed out that it was a necessary terminal formality. In a fax of 26 May to the head of the Medical Service she said she wanted to have the examination outside the Organization.

By a telegram of 28 May the Director of Personnel told her she must undergo examination in the Medical Service and get in touch with it at once. By a fax of 1 June she replied that she had already answered the telegram of 19 May from the head of the Medical Service and was waiting for a written reply to her request of 26 May. By a telegram of 4 June the Director of Personnel refused outside examination, confirmed that her sick leave would not be extended and asked her to report to the Medical Service on 9 June.

By a fax of 7 June which she sent to both the head of the Medical Service and the Director of Personnel she challenged that decision, repeated her demands and asked why the Organization had not extended her sick leave, citing Manual paragraph 323.512 ("if a staff member is on certified sick leave on the date of separation the effective date of separation will be extended until the end of his/her period of certified sick leave").

By a telegram of 8 June 1993 the head of the Medical Service pointed out that it was up to the FAO to grant sick leave and reminded her of her appointment for examination on the morrow. She failed to keep it. By a letter of 18 June the

Director of Personnel told her that further sick leave was refused because she had not undergone the examination. In her reply of 7 July 1993 she held to what she had said before.

It is the decision of 20 April 1993 to dismiss her that she is challenging.

B. The complainant submits that her complaint is receivable. She contends that being no longer an employee of the Organization she is not subject to the rule in Article VII(1) of the Tribunal's Statute that all internal means of redress must be exhausted.

On the merits she has five pleas. The first is that the warning and the decision to dismiss her should have come, not from the Personnel Division and the Legal Office, but from the division director. That is what Manual paragraph 314.222 requires on termination for unsatisfactory service. She contends that, having tried in vain to "persuade" the Director of GIL to approve the warning, the Personnel Division took advantage of his absence to get it signed by someone else in GIL. So the dismissal procedure is doubly flawed: it was started ultra vires, and there was breach of her right to a hearing as laid down in Manual paragraph 374.41.

She denies unsatisfactory service or conduct. The other staff said several times that they got on well with her, and her performance reports that she always did her work conscientiously. Relations with her supervisors soured because she expressed reservations about her post in GIL, which was pointless and a "sham" intended just to "mislead the Tribunal". The post was abolished on the date of her separation, her duties were few and they matched neither her qualifications nor her grade. By not giving her a suitable post the Organization failed to meet the commitments it had given the Tribunal and its obligations under paragraph 311.44 of the Manual.

The Organization offers not a jot of evidence in support of the charges against her. It overlooked material facts and drew clearly mistaken conclusions from her file. That she fell foul of personal prejudice is plain from the many attempts to dismiss her. The first came before the warning of 22 December 1992, which was just a pretext for getting rid of her.

Lastly, she cites the requirement in Manual paragraph 314.221 that the Administration try staff out elsewhere before dismissal for unsatisfactory service. By refusing to put her on trial elsewhere, despite her repeated requests, the Organization caused her unnecessary and undue injury.

Her second plea derives from the first one and is about her advancement to step XI in grade G.5. In support she repeats her previous arguments and quotes what Judgment 1163 said in 9 about her second complaint, namely that the Organization erred in law in construing and applying Manual paragraph 308.411. It has made the same error in this case.

In her third plea she asks that the date of termination be set at 31 July 1993. She contends that the Organization may not end the appointment of a staff member who is on sick leave and that it was prejudiced against her: contrary to common practice in the Medical Service she was not allowed to consult an outside doctor.

In her fourth plea the complainant denies that she was dismissed for unsatisfactory service and submits that the compensation due to her is that provided for in Article 301.151 of Annex III to the Staff Regulations. Citing Manual paragraphs 311.44 and 314.714 she alleges that she was dismissed because her post was abolished, and with no regard for any but the FAO's own interests, at a time when she was on sick leave and could not defend her case. She refers to several staff members in the same situation who did get such compensation.

In her fifth plea she seeks damages for moral injury and for the impairment of health caused by improper working conditions and the Organization's arbitrary treatment of her.

She asks the Tribunal to set aside the decision of 20 April 1993 dismissing her for "unsatisfactory service", as well as the recommendation of dismissal of even date and the warning of 22 December 1992; to have them withdrawn from her personal file together with the correspondence on the subject; and to order the Organization:

to pay her 25,000 Swiss francs in damages for moral injury;

to pay her as from the date of dismissal damages for material injury equivalent to the earnings she would have received had she stayed on until 30 April 1996, when she was to take early retirement, and to pay her in full as of 1 June 1993 until the same date her own and the FAO's contributions to the United Nations Joint Staff Pension Fund; and, subsidiarily, to continue regularly her monthly pay as from the date of dismissal until 30 April 1996, subject to the usual deductions and contributions;

to grant her as from 1 June 1993 advancement to step XI in grade G.5 for the period of service from 1 June 1991 to 31 May 1993, plus interest on the arrears at the rate of

10 per cent a year, the new salary at step XI to be taken into account in reckoning her separation entitlements including the termination indemnity;

to set the date of dismissal at 31 July 1993 instead of 26 May 1993 and pay her salary adjusted as above until that date, subject to any necessary changes, plus interest at the rate of 10 per cent a year;

to pay her the termination indemnity granted to staff members with continuing appointments under Article 301.151 of Annex III to the Staff Regulations, plus interest at the rate of 10 per cent a year as from the date of dismissal;

to pay her 10,000 Swiss francs in costs.

C. In its reply the FAO submits that the complainant's being no longer its employee does not relieve her of the obligation to exhaust the internal means of redress. Staff Rule 303.1311 allows former employees to appeal. By going straight to the Tribunal the complainant has failed to observe Article VII(1) of its Statute.

The Organization asks the Tribunal to dismiss her complaint as irreceivable and, subsidiarily, if it be declared receivable, to invite a reply on the merits.

D. In her rejoinder the complainant maintains that her complaint is receivable. She warned the Director of Personnel that she would be going to the Tribunal and sent him a "complaint" on 21 April 1993. Since it went unanswered she may go directly to the Tribunal in accordance with Article VII(3) of its Statute. Besides, if there was a risk that her complaint was irreceivable the Registrar would surely tell her in good time. He did not do so. In any event the Appeals Committee would not have been competent to hear her "complaint", and it is not impartial.

By failing to address the merits the Organization has robbed her of her right to rejoin. She presses her pleas and, as to her claim about the date of dismissal, seeks payment in lieu of three months' notice, from 1 August to 31 October 1993.

E. In its surrejoinder the Organization reaffirms that the complaint is irreceivable.

Citing the "complaint form" that the complainant has filed it submits that the decision she is impugning is the one of

20 April 1993. If, as she makes out, she is challenging the implied rejection of her claims, she would have said as much in point 3(b) of the form; instead she has just entered "not applicable".

Her doubts about the Appeals Committee's competence are irrelevant. Rule 303.113 states that "the Committee shall determine its own jurisdiction in cases when its competence is in doubt". It is odd of her to question its impartiality when it found in her favour in an earlier dispute.

CONSIDERATIONS:

1. The complainant joined the staff of the FAO in 1976 as a bilingual shorthand-typist at grade G.4 under a two-year contract. The Organization confirmed her appointment in 1977 and promoted her to G.5 in 1978. From 1984 onwards she was kept on short-term assignments and given no permanent post despite her repeated demands for one. She lodged her first complaint in 1990, after the Director-General had refused one such demand, and the Tribunal dismissed it in Judgment 1162 of 29 January 1992.

2. By a memorandum of 22 December 1992 she was given under Manual paragraph 314.221 a "formal warning" signed by the Director of her unit, the Library and Documentation Systems Division (GIL), on the grounds of unsatisfactory performance. She sent the Director of the Personnel Division a memorandum of 19 January 1993 giving explanations. Meanwhile, by a memorandum of 15 January, she was given a second warning, again signed by the Director of GIL, and to that she answered on 27 January. In a memorandum of 9 February 1993 the Director of Personnel said that he fully endorsed the warnings of 22 December 1992 and 15 January 1993.

3. The Organization granted her sick leave from 8 February until 8 May 1993 and later extended it to 26 May.

4. By a memorandum dated 20 April 1993 the Director of GIL told her of his recommendation to the Director of Personnel for her dismissal and by a decision of even date the Director of Personnel dismissed her for unsatisfactory performance on 8 May 1993, when her sick leave was at that time to end. The next day she wrote a letter to the Director of Personnel acknowledging receipt of the decision, asking that she be informed of the allegations and evidence against her and "rejecting" the dismissal as "based on unfounded charges". Moreover, by her present complaint, which she lodged with the Tribunal directly on 8 July 1993, she is asking for the quashing of the decision of 20 April.

5. The FAO submits that her complaint is irreceivable, mainly on the grounds that she is impugning a decision by the Director of Personnel, not a final one taken by the Director-General on the advice of the Appeals Committee in accordance with the internal appeal procedure that the Staff Regulations and Rules lay down. The FAO further observes that on her own admission she has wittingly failed to comply with the requirement in Article VII(1) of the Tribunal's Statute that she exhaust the internal means of redress.

6. In support of the view that her complaint is receivable the complainant argues first that there are three reasons why she put no appeal to the Director-General: "delay" in getting hold of the material documents; her sick leave; and the harshness of the dismissal.

7. Those contentions hold no water. The only material document she needed for an appeal to the Director-General and later, if need be, to the Appeals Committee was the decision of 20 April 1993. Since she got it the very next day there was no "delay" whatever. Since she acknowledged receipt of it on 21 April while still on sick leave it is plainly mistaken for her to allege that such leave or the harshness of dismissal barred her from resorting to the internal remedies at her disposal.

8. She then pleads that the requirement in Article VII(1) of the Tribunal's Statute does not apply because she was no longer in the FAO's employ after she got notice of termination on 21 April 1993.

9. She is wrong on that score. She was still on the staff until the dismissal took effect, viz. at first 8 and then 26 May 1993. So she was free as a serving official until the latter date to appeal to the Director-General. Besides, the requirement in VII(1) applies to any complaint lodged with the Tribunal: to quote Article II(6), the complainant may be "the official, even if his employment has ceased".

10. In her rejoinder the complainant pleads Article VII(3) in support of the view that she was free to come straight to the Tribunal with a claim to the quashing of the implied rejection, to be inferred from sixty days' silence, of the internal "appeal" she says she lodged on 21 April 1993.

11. Again her plea fails. For one thing, her letter of 21 April 1993 was just an acknowledgment of receipt of the memorandum of 20 April and did not amount to an appeal. For another, she may not in her rejoinder challenge a decision - which she says was "implied" - other than the one she impugns

in her complaint. Since she made no appeal there could be no implied decision to reject one.

12. Lastly, she is mistaken in arguing that although she stated in writing her intention of going straight to the Tribunal the Registrar did not advise her at the time to appeal first to the Organization. The Registrar does not make preliminary rulings on receivability, an issue which only the Tribunal may decide.

13. Since the complainant has failed to exhaust the internal means of redress her complaint is irreceivable under Article VII(1) of the Tribunal's Statute and therefore fails in its entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas Mella Carroll E. Razafindralambo

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re AHMAD (No. 4)
(Application for execution)

Judgment 1361

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1298 filed by Mr. Rashid Ahmad on 28 February 1994 and the reply of 1 April 1994 from the United Nations Educational, Scientific and Cultural Organization (UNESCO);

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. In Judgment 1298 of 14 July 1993 the Tribunal set aside a decision by the Director-General of UNESCO confirming an earlier refusal to renew the complainant's appointment. It ordered the Organization to reinstate him in its employ as from 1 February 1992 at grade D.1 under a fixed-term appointment to expire on 14 July 1995; dismissed his claim to moral damages; and awarded him 3,000 United States dollars in costs.

2. UNESCO saw fit to apply on 2 November 1993 for review of Judgment 1298. In Judgment 1309 of 31 January 1994 the Tribunal dismissed its application as clearly irreceivable under Article 8(3) of the Rules of Court then in force.

3. In a letter of 20 August and a reminder of 9 November 1993 the complainant asked the Director-General to take action to execute Judgment 1298. All he got by way of reply was a letter dated 22 November from the Director of the Bureau of Personnel saying that the Director-General had "taken note of the contents" of his letters but had applied for review of the judgment.

4. The day after the delivery of Judgment 1309 dismissing the application for review the complainant sent the

Director-General another letter asking him to take prompt action on Judgment 1298. The only answer UNESCO vouchsafed its employee was an acknowledgment of receipt of 17 February 1994 from the Director of the Bureau of Personnel saying that "Due note has been taken by the Director-General of the content of your letter".

5. The complainant has therefore had to come back to the Tribunal with an application for execution. He is asking it to order UNESCO to execute "Judgment 1298, as upheld by Judgment 1309" without further delay; grant him interest on the sums due; and award him moral damages for UNESCO's failure to execute Judgment 1298, and costs.

6. UNESCO's reply consists merely in an acknowledgment of receipt of the Registrar's letter forwarding the application and the comment that the Organization's Executive Board would be examining the matter "at its forthcoming session". The Organization makes no attempt to justify or even explain its posture.

7. The Tribunal reaffirms that its rulings have the force of res judicata and are binding on the organisations that have recognised its jurisdiction. Any organisation that offends against that rudimentary principle by refusing to give effect to judgments it does not care for is disregarding the rights of staff and its own interests and is acting in breach of the obligations that it has assumed by recognising the Tribunal's jurisdiction.

8. As to the complainant's reinstatement the Tribunal refers to its ruling in Judgment 1298 and sends the case back to the Organization for the immediate discharge of its obligations.

9. The complainant's claim to interest succeeds, and UNESCO must pay him interest to be reckoned at the rate of 10 per cent a year on the sums payable to him since the date of the ordered reinstatement and as from the date at which each monthly sum yet unpaid fell due.

10. Because of its dilatoriness UNESCO must further pay him 20,000 French francs in damages for all forms of injury he has sustained by reason of its failure to give effect to the Tribunal's rulings.

11. He is entitled to 5,000 French francs in costs.

DECISION:

For the above reasons,

1. The case is sent back to UNESCO for immediate reinstatement of the complainant in execution of Judgment 1298.
2. The Organization shall, as set out in 9 above, pay him interest at the rate of 10 per cent a year on the sums due.
3. It shall pay him 20,000 French francs in damages.
4. It shall pay him 5,000 French francs in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

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SEVENTY-SEVENTH SESSION

In re BLUSKE (No. 4)
(Application for execution)

Judgment 1362

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1328 filed by Mr. Guillermo Carlos Bluske on 23 March 1994, the reply of 27 April from the World Intellectual Property Organization (WIPO), the complainant's rejoinder of 18 May and the Organization's surrejoinder of 22 June 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. This complaint, Mr. Bluske's fourth against the World Intellectual Property Organization (WIPO) arises out of the Organization's failing to execute Judgment 1328 of 31 January 1994 on his third complaint.

2. The Organization having twice refused to execute in one and the same case, the history of it is summed up below.

> Judgment 1154 of 29 January 1992, on Mr. Bluske's first complaint, held to be unlawful WIPO's termination of his fixed-term two-year contract of employment and ordered it to reinstate him by extending his appointment or, if that proved impossible, to pay him the equivalent of one year's salary and allowances in damages for all forms of injury sustained.
>
> In Judgment 1242 of 10 February 1993, on his second case, the Tribunal found that, though WIPO had paid him damages as Judgment 1154 had ordered, it had made no effort to discharge its primary duty, which was to do its utmost to reinstate him. The case was therefore sent back to the

Organization for a new decision on reinstatement and he was awarded the equivalent of one further year's salary and allowances in damages for all forms of injury he had sustained because of its failure to execute Judgment 1154.

Judgment 1328 of 31 January 1994, on his third complaint, dismissed some misconceptions about Judgment 1242 and held that the Organization had failed to execute it. The defendant had not yet taken a properly substantiated decision on reinstatement and had failed to pay the complainant the award of damages, which, unlike the one in Judgment 1154, had been unconditional. It ordered WIPO to pay him compound interest and take an express and properly substantiated decision on reinstatement at the earliest possible date.

3. This complaint demurs at the Organization's persistent refusal to decide on reinstatement and pay the sums awarded in Judgment 1242. By way of redress the complainant is seeking in essence damages in an amount equivalent to the salary and allowances he would have earned had he stayed on in WIPO until the age of retirement, plus compensation for the loss of pension rights due to the premature termination of his employment.

4. Though it refrains from entering a formal plea the Organization submits that the complaint may be irreceivable because the complainant has come straight to the Tribunal before putting a formal claim to it. It says it wants "an early solution that satisfies both sides" and still hopes to settle the whole case with the complainant out of court. It describes reinstatement as "obviously out of the question" for the reasons it gave in its reply to the second complaint (see Judgment 1328 under 6); so it "sees no point in taking an express decision to that effect". It points out that the complainant held only a two-year appointment and it regards as extravagant his claim to damages for loss of a full career up to the age of retirement, including pension rights. It takes him to task for passiveness in failing to look for employment in another international organisation or in private enterprise.

5. On the issue of receivability it suffices to refer to what Judgment 1328 said under 14 to 17: since the complainant has found difficulty in securing the execution of earlier judgments he is free to come back to the Tribunal directly without first going through any internal appeal procedure.

6. As to the merits, since the dispute arose out of the decision not to renew his two-year appointment the Organization is right as a matter of principle to refuse his claim to damages for loss of a full career. The two consecutive awards of one year's salary afford sufficient redress to someone who

had a rightful expectation of renewal for no more than two years. His claims under this head fail.

7. But not a whit less sound on that account are the claims he rests on WIPO's failure to pay him the damages awarded in Judgment 1242 and on its refusal to take an express and properly substantiated decision on reinstatement.

8. For the delay in paying him the damages there is already a penalty in Judgment 1328: payment of interest on the sums due. As he has asked, such interest is further due on the award of costs in that judgment.

9. The Organization has not discharged its obligation to take an express and properly substantiated decision on reinstatement by passing critical and incidental comment on the complainant's qualifications in its pleadings on his second complaint. The constant thrust of the three earlier judgments was to secure from the Organization, on account of its grossly unlawful termination of his appointment in 1991, discharge of its obligation to communicate to him a proper decision. He might then impugn that decision if it was not to his liking, and the Tribunal might if need be review the reasons for it, which is something it has not yet been able to do. The complainant is entitled to such decision as a matter of course, without having to ask for it and without delay. That obligation WIPO has stubbornly ignored, it is in breach of the rule of law in the international civil service, and that is not to be brooked.

10. So the Tribunal must rule yet again on WIPO's refusal to discharge the obligation to decide on reinstatement. As it has stated more than once, its judgments are to be given immediate effect. In the regrettable event that the Organization continues to disregard that rule and fails to act within 30 days of the date of delivery of this judgment it must pay the complainant 10,000 Swiss francs by way of penalty for each further month of delay.

11. Since the complainant has succeeded in his main claims - to execution of the earlier judgments - he is entitled to costs, and the amount is set at 10,000 French francs.

DECISION:

For the above reasons,

1. The Organization shall, within thirty days of the date of delivery of this judgment, take the decision ordered under point 2 of the ruling in Judgment 1328.

2. If it fails to do so within the thirty days it shall pay the complainant the sum of 10,000 Swiss francs by way of penalty for each further month of delay.

3. It shall pay him compound interest reckoned as from 31 January 1994 at the rate of 10 per cent a year on the award of costs in Judgment 1328.

4. It shall pay him a further sum of 10,000 French francs in costs for this complaint.

5. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
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SEVENTY-SEVENTH SESSION

In re POPINEAU (Nos. 6, 7 and 8)

Judgment 1363

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 6 October 1993 and corrected on 18 October 1993, the EPO's reply of 10 January 1994, the complainant's rejoinder of 1 March and the Organisation's surrejoinder of 29 April 1994;

Considering the seventh and eighth complaints filed by Mr. Popineau against the EPO on 13 October 1993 and corrected on 24 October 1993, the EPO's replies of 12 January 1994, the complainant's rejoinders of 1 March and the Organisation's surrejoinders of 29 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 14, 16, 28, 45, and 93 to 113 of the Service Regulations of the European Patent Office, the secretariat of the EPO and circular 135 of 6 August 1984;

Having examined the written submissions and disallowed the complainant's application of 11 May 1994 for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1949, joined the EPO in 1983 and worked as an examiner in Directorate-General 1 (DG1) at The Hague.

By a letter of 5 November 1990 he applied under Article 45 of the Service Regulations for leave on personal grounds from 1 January 1991 for one year in which he would be gainfully employed with a firm of consultants on electronic data processing. The leave was granted in a letter of 21 December 1990. In a letter of 11 December 1990 of which he acknowledged receipt on 13 December the Head of the Personnel Department of the European Patent Office alerted him to Article 16(1) of the Service Regulations which is headed "Incompatible activities" and reads:

> "... A permanent employee shall neither hold any office nor pursue any activity which is incompatible with the normal execution of his task, including any activity related directly to his function at the Office and performed independently of the latter for any purpose other than educational.
>
> In particular, a permanent employee shall not participate directly or indirectly in the preparation or filing of an application for a patent for invention or any equivalent, or in any official proceedings relating to any such application or any resulting patent, whether on his own account or on behalf of others."

By a letter of 31 October 1991 the complainant applied for another year's leave and that was granted in a letter of 6 November.

In March 1992 there came to the Office's notice a pamphlet (SIREN No. 3248366162) advertising a firm called "Gérard Popineau Consultants" and offering among other things "research into the latest technology ... for patent applications". The pamphlet was a trading prospectus and described the work of a firm in France, with addresses in Paris and at Cogolin, in the department of Var, which consisted of university and professional people belonging to a variety of disciplines such as mathematics, data-processing, physics, electronics, bio-medical engineering and architecture.

In a letter of 27 March 1992 the Vice-President of the EPO in charge of DG1 took the complainant to task for having engaged in unauthorised outside professional activities since his appointment in 1983; ordered him to stop them at once because they were forbidden by Article 16(1); and told him that disciplinary proceedings had been started to dismiss him.

By a letter of 31 March 1992 to the President of the Office he denied engaging in professional activities incompatible with his EPO duties and receiving any income but salary between the date of his appointment to the EPO and the starting date of his unpaid leave. He pointed out that the pamphlet had gone out in September 1991 and asked that the disciplinary proceedings stop.

On 4 May 1992 the Disciplinary Committee received a report instigating disciplinary proceedings. On 5 and 6 May its chairman invited the complainant by telephone and by telegram to attend a meeting at The Hague on 11 May at which lots would be drawn for membership of the Committee in accordance with Article 98 of the Service Regulations. Money was paid into his account to cover travel costs. Since he did not reply the deputy chairman wrote to him on 25 May to say that lots would be drawn at a meeting on 12 June whether he came or not.

By letters of 21, 27 and 28 June the complainant filed three appeals. The first, which was numbered 19/92, was against the decision of 27 March 1993 forbidding him "any activity related to research into thė latest technology ... for applications for patents". The second, 20/92, challenged the same decision insofar as it started disciplinary proceedings for dismissal. The third, 21/92, impugned "the decision of the Deputy Chairman of the Disciplinary Committee to start disciplinary proceedings to dismiss him with reduction of severance grant, notified by a letter of 25 May 1992".

In its report of 3 August the Disciplinary Committee held that:

> the charge of acceptance of payment during the period of active service and without prior leave was not proven;
>
> publication of the pamphlet "Gérard Popineau Consultants" was damaging to the EPO's interest and good name;
>
> publication of it was serious misconduct;
>
> the charge that he had engaged in forbidden activity before or during unpaid leave was not proven.

The majority believed that loss of step would be a proper penalty.

The Principal Director of Administration wrote on 26 August 1992 informing the complainant that the President did not agree with the majority and upheld his decision and asking him in accordance with Article 102(3) of the Regulations whether he wished to comment.

Since the complainant did not, the President confirmed by a letter of 2 September 1992 the decision to dismiss him under Article 93(2)(f), said it would take effect on 1 February 1993 and reduced his severance grant by one-third. Another letter of even date told him that he was forbidden any activity connected with patents until 1 February 1993. By a letter of 9 September he asked whether the ban applied to his colleagues and partners as well.

By a letter of 19 October the Organisation replied that it did, and he filed another two internal appeals on 30 November 1992 and 16 January 1993. The first, 42/92, sought the quashing of the decision of 2 September dismissing him. The second, 1/93, challenged the decision of 19 October "to treat it as a breach of Article 16(1) for an employee to carry on activity directly related to EPO duties".

Since his leave ended on 31 December 1992 and his dismissal took effect only on 1 February 1993, he reported for work on 4 January. By a minute of that date the Head of Personnel told him that he was relieved of duty but would be paid for January. The next day a minute forbade him to set foot on the Office's premises. By a letter of 20 January 1993 he challenged both decisions in a sixth appeal, 7/93.

In a report of 24 May 1993 the Appeals Committee, to which all his appeals had been referred, recommended allowing his claims in appeal 42/92, to the quashing of dismissal and to the refund of travel expenses, but none of the others.

By a letter of 7 July 1993, the impugned decision, the Director of Staff Policy notified to him the President's rejection of all his appeals.

B. In his sixth complaint the complainant observes that many examiners have carried out patent work while on leave on personal grounds. He cites the case of one who he says, though still on the staff, is the founder and main shareholder of a firm providing patent-related services. The Office encourages training in industry, which often entails activity forbidden by Article 16(1). So the EPO has discriminated against him. Dismissing him is a misuse of authority, the more so as the Organisation infringed his right to a hearing.

He submits that the EPO offers no proof of its charges, particularly the one that he infringed 16(1). Its failure to abide by the rules of evidence is an error of law. And even if he had offended against 16(1) it ought to have taken the action provided for in 16(3).* By failing to do so it was in breach of the prescribed procedure.

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* Article 16(3) says that

"Any permanent employee may be required:

- to terminate within a specified period any activity which is prohibited by paragraph 1;
- to take the necessary steps for terminating within a specified period any employment exercised by his spouse where such employment is in any way connected with the Organisation and proves to be incompatible with that of the employee.

If the activity or employment in question does not cease within the specified period, the employee may be transferred to another post or his services may be terminated in accordance with Article 53."

Citing the Appeals Committee's report, he argues that the penalty the Organisation imposed on him was out of proportion to the offence: the decision to confirm dismissal - against the Committee's unanimous recommendation - was flawed with blatant misappraisal of the evidence and misuse of authority and prompted solely by his staff union work.

In his seventh complaint he submits that 16(1) applies only to an official in active employment, not to one granted leave on personal grounds. So the dismissal is tainted with an error of law. Besides, all he was doing was document research, which French consultants do not regard as part of the process of applying for a patent and which was therefore not incompatible with his EPO duties. There was abuse of authority.

In his eighth complaint he refers to appeals 20/92 and 21/92. He challenges the decision of 27 March 1992 in which the EPO, notwithstanding evidence to the contrary, accused him of outside professional activity. The decision of 25 May 1992 is in breach of the rule against double jeopardy. The drawing of lots for membership of the Disciplinary Committee was not as prescribed.

In his sixth complaint he asks the Tribunal to:

quash the decision to dismiss him with reduced payment of severance grant;

order his immediate reinstatement and payment of salary and allowances as from February 1993;

cancel the disciplinary proceedings for breach of the rules of procedure;

award him 40,000 French francs for the moral injury in being barred from the EPO's premises;

award him damages equivalent to his potential earnings for the injury in being wrongfully forbidden professional activity between April and December 1992;

order the EPO to pay the sum of 1 French franc to the European Research Federation in moral damages;

order the waiver of the immunity of an EPO official, interference with the exercise of trade union rights being a penal offence in French law.

In his seventh complaint he further asks the Tribunal to:

quash the decision of 19 October 1992;

award damages in an amount equivalent to his associates' potential earnings from the wrongfully forbidden activity.

In his eighth complaint he further asks the Tribunal to:

order the waiver of the immunity of two other EPO employees;

declare the decision to start disciplinary proceedings to dismiss him to be in breach of trade union rights;

declare unlawful the letter of 27 March 1992 and the resulting procedure;

cancel the disciplinary proceedings.

In all three complaints he seeks costs.

C. In its reply to the sixth complaint the Organisation applies for joinder on the grounds that all three complaints challenge the same decision and raise the same issues of fact.

It submits that appeals 20/92 and 21/92 are not receivable since what they impugned were not decisions adversely affecting the complainant.

On the merits it submits that the decision to start disciplinary proceedings, a matter in which the President has broad discretion, was fully warranted and shows no flaws. A second drawing of lots for membership of the Disciplinary Committee, done in the presence of a member of the Staff Committee, proved necessary to avoid prolonging unduly the delay caused by the complainant's particular situation. Besides he made no challenge, as he had the right to do under Article 98(5). His right to a hearing was fully observed. He is wrong in arguing that what Article 16(3) says is compulsory, and both Committees held that disciplinary proceedings might be brought under Article 93.

Dismissal had nothing to do with the complainant's staff union work but was due to his breach of Article 16(1). Appeal 19/92 too was irreceivable because he could not disclaim knowledge of a rule the Head of Personnel had reminded him of in the letter of 11 December 1990. It applies to all staff whether in active service or not and is intended to safeguard the Organisation's interests. In line with part of the Disciplinary Committee's conclusions the Organisation conceded that the complainant had not practised any forbidden activity between 1983 and the start of his leave. But unlike the Committee it considers, on the strength of concurring evidence it sets out at length, that the complainant did engage in forbidden activity. By failing to disclose its real nature he was in bad faith. Worse still, it is not proven that he has desisted.

It is untrue that the EPO condones breach of the rules in 16(1). It strictly checks that they are observed, particularly when examiners are undergoing industrial training. As the owner of his business the complainant was not in the same case as the other official whom he mentions by way of example, who is "now just a shareholder" in a service company.

His misconduct was serious enough to warrant dismissal, and there is no question of reinstatement.

His claim to waiver of the immunity of EPO officers is irreceivable because he put it for the first time in one of his internal appeals and there was no decision; it is also groundless because the officers were acting in the discharge of duty.

He has no locus standi to claim damages for a trade union which is not privy to the dispute.

In answer to his seventh complaint the EPO submits that appeal 1/93 against the decision of 19 October 1992 was irreceivable because the decision had merely confirmed the prohibition in the letter of 11 December 1990. Besides, as the Appeals Committee said, the prohibition was warranted.

In its reply to the eighth complaint the Organisation recalls that according to the case law a decision to start disciplinary proceedings is not appealable.

D. In the rejoinder on his sixth complaint the complainant objects to joining the three complaints on the ground that they do not challenge the same decision. Although the Appeals Committee took all his appeals together it deliberated on them separately.

He enlarges on his pleas. Although the President said that on the Disciplinary Committee's recommendation he was dropping some of the charges, he upheld the most heavy penalty.

The complainant contends that when he applied for leave the Organisation knew what kind of work he would be doing, and there was no requirement in the rules to reveal to it the source of his income.

Article 16 is not clear about the sort of activity it forbids. By construing it differently from the Organisation he committed a merely involuntary breach of it. So by imposing the most heavy penalty the EPO showed bias, particularly since it might have contemplated less severe action. He maintains that it was out to get him for his staff union activity.

In his rejoinder on his seventh complaint he mentions other officials' outside patent work and contends that the Organisation discriminated against him. In other cases, for example when examiners undergo training in industry, it construes Article 16 much more leniently.

Lastly, in his rejoinder on his eighth complaint he claims damages for the "libellous" charges in the decision of 27 March, asserts that the letter of 25 May 1992 from the deputy chairman of the Disciplinary Committee did start new disciplinary proceedings and repeats that the whole procedure was flawed.

E. In its surrejoinder on the sixth complaint the Organisation presses its pleas and its application for joinder.

In its submission the research done by the complainant did offend against Article 16, no matter what it was eventually used for. He incurred the risk of its being used for a patent application and liability for the consequences.

Article 16 applies also to an official who is on leave on personal grounds. The complainant had been given an express warning on 11 December 1990 and acted in bad faith, particularly since he should have asked for clarification if in doubt about what the article meant.

The EPO showed no bias against him. He may not be put on a par with examiners on industrial courses, who remain under direct EPO supervision and sign an agreement that they will maintain confidentiality.

Lastly, relying on a written statement of 28 April 1994 by an accredited Office agent, the EPO states that it has had evidence in its possession since 1991 that the complainant was carrying on forbidden activity.

In its surrejoinder on his seventh complaint the Organisation presses its earlier pleas and submits that the complainant's accusations against other staff are groundless and libellous.

In its surrejoinder on his eighth complaint it submits that the allegations in the letter of 27 March were founded and that by failing to attend the Disciplinary Committee hearings he himself hampered due process.

CONSIDERATIONS:

1. The complainant used to serve the EPO as an examiner at grade A2 in Directorate-General 1 at The Hague. He was dismissed for disciplinary reasons on 1 February 1993, and his main claims in his three complaints are to the quashing of the dismissal and to reinstatement.

The background to the dispute

2. The dismissal came about as follows. At the end of 1990 the complainant was granted one year's unpaid leave from 1 January 1991 and he later had it extended by one year. Before it started the Head of the Personnel Department sent him a letter dated 11 December 1990 pointing out Article 16 of the Service Regulations, which is headed "Incompatible activities" and forbids any activity incompatible with the normal execution of the employee's duties with the Organisation.

3. In March 1992 the EPO came by a pamphlet headed "Gérard Popineau Consultants". It advertises a "firm" established in 1982 in France that offers assistance in management and scientific and technical development, including industrial property and in particular patents for inventions. The pamphlet makes much of the firm's long practical experience in the fields it mentions. The last page offers personal data about Mr. Popineau.

4. The Vice-President of DG1 sent a copy of the pamphlet to the complainant on 27 March 1992 saying that it showed that since appointment to the Organisation he had been engaging in outside professional activity without seeking leave from the President of the Office as circular 135 of 6 August 1984 required. The Vice-President reminded him of his professional duties under Article 16 of the Staff Regulations, ordered him to desist at once and told him that disciplinary proceedings would be started to dismiss him because of the serious nature of what the pamphlet revealed.

5. On 4 May 1992 the Principal Director of Administration sent the chairman of the Disciplinary Committee a "report initiating disciplinary proceedings". It set out the charges against the complainant, the material rules and the intended sanction, which was dismissal with a one-third reduction in severance grant, as provided for in Article 93(2)(f). On 5 May he was invited to a meeting to be held on 11 May at The Hague at which lots were to be drawn in accordance with the rules to determine the membership of the Disciplinary Committee. Since he did not answer the deputy chairman of the Committee wrote on 25 May inviting him to a meeting on 12 June at which lots would

be drawn whether he came or not. The report introducing the proceedings was appended.

6. Though duly invited, the complainant did not attend the disciplinary proceedings and entered no submissions in rebuttal. The Committee heard the Administration and asked whether it could prove that he had actually engaged in the activities advertised in the pamphlet. The Administration admitted that it had no evidence but the pamphlet.

7. The Committee reported on 3 August 1992. It was unanimous that in the pamphlet the complainant was offering services incompatible with his obligations under Article 16 and that by advertising them to the public he had committed a serious and punishable offence. But the majority held that the Administration had failed to show actual performance of the advertised services and for that reason recommended not dismissal but the loss of step increment provided for in Article 93(1)(d) of the Service Regulations. The minority's position is not disclosed.

8. On 26 August 1992 the President of the Office informed the complainant that he rejected the Committee's conclusion and intended to dismiss him with a reduction in severance grant, but invited him to submit comments in accordance with Article 102(3). The complainant did not respond, and on 2 September 1992 the President sent him a letter giving notice of dismissal at 1 February 1993 and reminding him that he must not in the meantime carry on any activity incompatible with his status as an EPO employee.

9. His leave expired at the end of 1992 and he reported for duty at The Hague early in January 1993. He was thereupon informed of two decisions: one, dated 4 January, relieved him of duty and granted him paid leave for January; the other, dated 5 January, banned him from EPO premises.

10. Abandoning the passive posture he had taken throughout the disciplinary proceedings, he then lodged several appeals, first against the decisions starting those proceedings, then against dismissal and lastly against the decisions of 4 and 5 January 1993.

11. On receiving the notice of dismissal he had asked the Administration in a letter of 9 September 1992 whether the ban on activity incompatible with his duties at the EPO until separation extended to his colleagues and partners in the firm. By a letter of 19 October 1992 the Principal Director of Administration answered that it did insofar as their activity was in his own interest.

12. His six appeals were referred to the Appeals Committee, which joined them. As appellant he took an active part in the proceedings. The Committee held his appeals either irreceivable or devoid of merit but for the main one against dismissal and the accessory penalty and his subsidiary claim to refund of the costs of travel to The Hague to attend the hearings. It held his main appeal receivable and sound.

13. The Committee issued its report on 24 May 1993. Its reasoning is much the same as the Disciplinary Committee's. It holds that by advertising services in the pamphlet the complainant was guilty of a serious breach of professional obligations but that the Office has failed to prove that he actually carried on the activity advertised. It seeks to determine in particular whether he acted in bad faith and finds that not proven. It therefore recommends that the President reverse the dismissal and meet the costs of his travel to attend its hearings. It says that it is of one mind about its reasoning and final recommendation.

14. By a letter of 7 July 1993 the Director of Staff Policy told the complainant that the President disagreed with the Appeals Committee and took the view that he had carried on activity incompatible with his status as an EPO official and had acted in bad faith; so all his appeals were rejected and the disciplinary sanction in the letter of 2 September 1992 was confirmed.

15. The sixth complaint, lodged on 6 October 1993, impugns the decision of 7 July 1993. The seventh, of 13 October 1993, challenges the ban on any incompatible activity on the part of the complainant's colleagues or partners; and the eighth, of even date, appeals against the warning of 27 March 1992 from the Vice-President and the letter of 25 May 1992 from the deputy chairman of the Disciplinary Committee notifying the start of the disciplinary proceedings.

16. As the EPO asks, the seventh and eighth complaints are joined to the sixth because they touch on aspects of the main dispute.

The sixth complaint

17. In support of his main complaint Mr. Popineau puts forward the following pleas:

that there was breach of his procedural rights and right to a hearing;

that he was exempt from all professional obligations while on leave;

that the Organisation has no evidence to bear out its charges and misappraised the facts;

that the penalty was too harsh in view of the EPO's tolerance of similar practices by other officials.

The pleas are taken up below in that order.

18. The material rules are the following:

Article 14 of the Service Regulations is the first article in the chapter on the rights and obligations of permanent employees and is entitled "General Obligations". Paragraph (1) states:

> "A permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind".

Article 16 of the Regulations is entitled "Incompatible activities" and states in (1):

> "... A permanent employee shall neither hold any office nor pursue any activity which is incompatible with the normal execution of his task, including any activity related directly to his function at the Office and performed independently of the latter for any purpose other than educational.
>
> In particular, a permanent employee shall not participate directly or indirectly in the preparation or filing of an application for a patent for invention or any equivalent, or in any official proceedings relating to any such application or any resulting patent, whether on his own account or on behalf of others."

Circular 135 of 6 August 1984 requires staff to seek the President's leave to engage in any gainful outside activity and states that such activity must not impair the normal execution of duties.

Due process

19. The complainant pleads first that the Organisation's disregard of the prescribed procedure impaired his right to a fair trial as guaranteed in the Universal Declaration of Human Rights. He does not explain.

20. From scrutiny of the successive stages of the disciplinary proceedings the Tribunal is satisfied that the complainant was able to defend his rights throughout. He was

told of the charges against him; he was invited to the meeting to set up the Disciplinary Committee and to its hearings; and its report and the final decision were notified to him. Instead of taking the opportunities he was offered he did his utmost to drag out and hamper the disciplinary proceedings: he did not answer its summons but, without running the risk of its questioning him, made use of the internal appeal procedure to challenge its proceedings indirectly.

21. As to the Appeals Committee proceedings, the Tribunal has one reservation on a matter that neither side has raised: the relationship between the disciplinary procedure, governed by Articles 93 to 105 of the Service Regulations and the appeals procedure prescribed in Articles 106 to 113.

22. Even if disciplinary proceedings have begun there can be no "act adversely affecting" an employee within the meaning of Article 107 until the proceedings are over and there is a final decision by the competent authority. So the complainant's internal appeals were premature insofar as he lodged them before the President had taken his decision of 2 September 1992 on the Disciplinary Committee's report.

23. Whatever drawbacks there may be in the overlap between the disciplinary and appeal procedures, the complainant's procedural rights were in any event scrupulously observed. There was therefore no breach whatever of his right to a fair trial.

The professional obligations of an employee while on leave

24. The complainant contends that while on leave, from the beginning of 1991 to the end of 1992, he was free to carry on his firm's business and was not bound by any professional obligations as an employee of the EPO. He said so in as many words in his appeal of 21 June 1992, and again in the one of 27 June 1992, which contains the remark: "Article 16 does not apply to an employee with non-active administrative status". That is an attempt to elude criticism of his personal behaviour and of the undated pamphlet, the main exhibit in the disciplinary proceedings. He argues, though he fails to prove, that the pamphlet was published in 1991, i.e. at a time when he says he was relieved of professional obligations.

25. The plea fails. An official who is granted leave for any reason remains bound by all professional obligations but one - for that is what leave means - the performance of duties. The Head of the Personnel Department expressly reminded the complainant in the letter of 11 December 1990 that he would still have those obligations while on leave. But in any case

he continued in law to be under all the obligations imposed by professional ethics, not just the one which the Head of Personnel's letter actually mentioned, and which was to refrain from helping to draw up patent applications.

26. So the complainant must be judged on his behaviour throughout the period of his employment in the Organisation, no diminution whatever of his obligations being admissible while he was on leave.

The proof and the nature of the misconduct

27. The main item of evidence that the Administration put to the Disciplinary Committee is the pamphlet described above. The complainant has never denied the authenticity or content of the pamphlet or argued that the services advertised were not provided. The Disciplinary Committee therefore had from him a tacit admission which, being absent from the hearings, he never rebutted at the time.

28. Only when the Disciplinary Committee had voiced doubt as to whether the advertised services were being provided did he change tack and seek in his submissions to the Appeals Committee to belittle the pamphlet. He made out that he had never carried on any activity incompatible with his professional obligations until he started his leave; that the pamphlet went out only at the end of the leave; and that it was just "trader's puff" anyway. Actually this last point is at odds with his repeated assertion in his briefs that his firm was not "in trade".

29. Some preliminary remarks are called for about the two bodies that in turn dealt with the case.

30. Though the Disciplinary Committee had an indisputable right and duty to satisfy itself that the Administration had a good case against the complainant, particularly in absentia, there are three points worth making.

> The first is that the Committee failed to consider whether the pamphlet - besides, as it accepted, advertising services - was not in itself evidence of actual activity.
>
> Secondly, the Committee arbitrarily shifted the burden of proof to the Administration. There was from the complainant's own hand a detailed description of his activity, and his firm was registered for business in France. So the burden was rather on him to show that it was nevertheless "dormant".
>
> Thirdly, the Committee chose, again arbitrarily, to require from the Organisation evidence that it could not

possibly produce since it had no means whatever of investigating an offence committed elsewhere by someone bent on eluding its control.

31. As for the Appeals Committee, it promised in paragraph 56 of its report to look into "all" the grounds for dismissal "subject only to the condition that it should not duplicate the work of the Disciplinary Committee". Yet in paragraph 64 it simply endorsed all the points made by the Disciplinary Committee. It failed to examine several issues raised by the Organisation: whether there was incompatibility between the complainant's professional obligations and a potentially gainful activity that in breach of circular 135 he had neglected to declare; whether the pamphlet itself afforded evidence not only of an offer of services but of actual activity (an issue overlooked by the Disciplinary Committee too); the further evidence that came to light in the appeal proceedings, such as the complainant's admission to having "customers", colleagues and partners; the fact that "Gérard Popineau Consultants" was on the business register; and the reason he had given to explain why an allegedly dormant firm was still on that register.

32. The Committee made the issue of his "good faith" the nub of its report. But that is not part of the test of misconduct. An employee will be guilty of misconduct if his behaviour is shown to be objectively incompatible with his professional obligations. So here the Committee was taking a point quite immaterial to the case at issue.

33. In view of the shortcomings in analysis by the Disciplinary and Appeals Committees the Tribunal will itself go into the merits. All the evidence it needs being at its disposal, it will order no further submissions from the parties.

34. The complainant's own description of his firm shows it to be a commercial consultancy offering technical, economic, legal and computer research. It has impressive technology capable of processing the latest data and of a sort it could not have acquired without a reliable network of inside and outside connections. The submissions on the seventh complaint reveal that to run the business its owner, who was none other than the complainant, had to enlist the help of agents and colleagues. Such investment in technology and staff makes sense only for a long-term venture. That is borne out by the pamphlet's alluding passim to the firm's "day-to-day work", to research "completed", to the "complexity" of the work done and to the "experience" gained.

35. So the pamphlet is plainly far more than a mere advertisement of services. It dwells in detail on the purpose and activity of a busy firm of consultants which - says the

complainant - has been growing since 1982. It is not credible for him to describe it as "dormant" and say he keeps it on as a "front" for the sole purpose of letting him enjoy the benefits of social security in France. The conclusion is that besides advertising services the pamphlet he distributed amounts to an avowal by him and to proof that he did engage in activity.

36. The full range of the firm's business as portrayed coincides with the EPO's own area of competence. The pamphlet contains many a reference to "industrial property", "copyright" and "patents"; it boasts years of practical experience in "a variety of environments", including the EPO; and it offers access to information at the EPO's disposal. Since the notes about the complainant's own attainments on the last page show no prior practical experience of his in that area the firm can have been offering such service only on the strength of his work at the EPO.

37. Two features of the business as advertised are especially worth noting here and indeed the EPO made a point of bringing them up in the disciplinary and appeals proceedings.

> The pamphlet speaks of "wide experience in the different areas of basic information technology ... and applications", gained in the course of many years' practice in various environments, including the European Patent Office.
>
> Elsewhere it says that "the studies may cover important economic or legal questions: research into the latest technology ... for filing patent applications; technology monitoring through analysis ... of applications for patents".

Unlike the public information offered by the EPO (known as CD-ROMS) the information thus offered must, because of the specific reference to "patent applications", mean information drawn from the EPO's own internal resources at the critical point of the procedure. That is borne out by the further offer in the pamphlet of access to the work of a French state body, the National Centre for Scientific Studies (CNRS), through the firm's "close connections" with research workers there.

38. For the foregoing reasons the Tribunal is satisfied that the complainant was in breach of his professional obligations throughout the period of his service at the EPO in that without leave he had set up and was running a consultancy firm under cover of his main professional activity. Such professional misconduct was compounded by the coincidence between the area of the firm's business and the EPO's own area of competence and by his offering or actually providing services to his customers that were connected with his official duties at the EPO.

The appropriateness of the penalty

39. The complainant argues that in view of the recommendations by the Disciplinary and Appeals Committees the penalty he got was disproportionately severe. He sees dismissal as the EPO's revenge for his staff union work, and he pleads breach of equal treatment inasmuch as it condoned in others, or even encouraged, activities like those he had himself engaged in. He cites the case of an official who allegedly held stock in a service company that had regular contracts with the Office and the practice whereby staff take up internships in firms that deal with the EPO, and which allegedly entails all sorts of links incompatible with the Organisation's independence.

40. There is not a shred of evidence to support the charge of "union-bashing" he levels against the EPO. What prompted the disciplinary proceedings was his pursuit of private business for his own enrichment and in abuse of his position as an official.

41. There are two answers to his allegation that the EPO condoned similar activity in others. One is that the Tribunal will not rule on cases that are not before it. The other is that even if there was a "grey area" in which such activity was allowed - and the Appeals Committee does concede the point in thinly veiled language in paragraphs 63 and 64 of its report - that would not excuse what the complainant did. Indeed his inadmissible behaviour warranted especially sturdy exemplary action by the EPO.

42. In sum the EPO was fully justified in getting rid of an employee whose doings were a constant challenge to its authority and deeply disruptive of the public service and in using its power under Article 93(2)(f) of the Service Regulations to impose on him the further penalty of making the maximum allowable reduction in severance grant.

43. For the same reasons the Tribunal upholds the decisions the EPO took on 4 and 5 January 1993 to make it plain that he did not belong in the Office any more and to prevent him from stirring up trouble.

The seventh and eighth complaints

44. His seventh complaint impugns a decision - it is not quite clear which - forbidding any activity incompatible with his status as an EPO official until he left the Organisation's employ. Yet on 9 September 1992 he asked whether the ban applied to "all colleagues and partners" in his firm, and the Principal Director of Administration replied on 19 October 1992 that it applied to anyone working for the complainant's benefit.

45. This incident has already been taken into account insofar as it amounts to admission by the complainant that his "consultancy" existed, that it was doing business and that it was out to make money. There is no need to entertain the EPO's plea that the complaint is irreceivable; the plea is ill advised anyway since it seeks to prevent a ruling on a legal issue of some importance. Suffice it to say that the Principal Director's letter of 19 October 1992, on which the whole case turns, was entirely warranted. If an official had only to bring in third parties to put his own improper activity beyond control by the Organisation it would become only too easy to get round Article 16 of the Service Regulations.

46. The thrust of the eighth complaint is obscure. It purports to challenge the letter of 7 July 1993 from the Director of Staff Policy notifying rejection of the Appeals Committee's report insofar as it recommended against disciplinary action. What it is in fact challenging is the warning in the letter of 27 March 1992 from the Vice-President and the letter of 25 May 1992 signed by the deputy chairman of the Disciplinary Committee and notifying the start of the disciplinary proceedings.

47. The complainant is using the eighth complaint to launch personal attacks on those two officers, whom he accuses of "intellectual dishonesty" and "union-bashing". By way of "counterclaim" he seeks the waiver of their immunity so that they may be prosecuted in the French courts for interference with the exercise of trade union rights, fabrication of evidence and misrepresentation.

48. Again there is no need to rule on the EPO's objections to receivability. The complainant is much given to attacks of that kind, as is plain from Judgments 1028, 1135 and 1136 on earlier complaints of his and from his protests about a "witch hunt" and "totalitarian power" in his appeal of 30 November 1992. The Organisation is hereby assured that the allegations are unfounded and malicious in case the two officers, whom the complainant picks on as French citizens, seek the Organisation's assistance under Article 28 of the Service Regulations in proceedings against him on charges of intimidation, calumny or libel.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re BUFACCHI (Nos. 1 and 2)

Judgment 1364

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Branimir Alberto Massimiliano Bufacchi against the European Patent Organisation (EPO) on 4 October 1993, the EPO's reply of 23 December 1993, the complainant's rejoinder of 24 February 1994 and the Organisation's surrejoinder of 12 April 1994;

Considering the second complaint filed by Mr. Bufacchi against the EPO, also on 4 October 1993, the EPO's reply of 23 December 1993, the complainant's rejoinder of 24 February 1994 and the Organisation's surrejoinder of 12 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 8, 60, 107 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 60 of the EPO's Service Regulations reads:

> "Home leave
>
> (1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed ...
>
> (2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

> Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

The complainant, who is a citizen of both Italy and the Republic of South Africa, was born on 15 June 1956 in Cape Town. Having accepted an offer of employment of 18 October 1990 he joined the staff of the EPO on 1 February 1991 as a patent examiner at grade A3 in Directorate-General 1 at The Hague. His letter of appointment said that he had Italian nationality and that his home was Varese, in Italy, and the record of entry into service confirmed that.

By a letter of 11 May 1992 he asked the President of the Office to review the designation of his home and change it from Varese to Johannesburg for the following reasons: (1) when he was recruited he thought that the Service Regulations limited the designation of home to the territory of European Members of the EPO, and only later did he realise that Article 60 applied also to officials whose home was outside Europe; (2) he was born and brought up in South Africa; (3) he and his wife were South African citizens; (4) his family and his wife's lived in South Africa; and (5) he owned a house in Johannesburg. He asked that if his request was turned down his letter should be treated as an internal appeal under Articles 107 and 108 of the Service Regulations.

By a note of 21 May 1992 a personnel officer rejected his request on the grounds that in his letter of 9 November 1990 he had unreservedly accepted the offer of employment of 18 October 1990, which expressly said that for the purpose of Article 60 of the Service Regulations his home would be Varese. The application form had - the note went on - asked for information on nationality at birth and at the time, and the complainant had answered that at birth he had been both Italian and South African and that he was then Italian. His situation had not changed and he had not given the full information required.

He replied on 3 June 1992 that in an interview with a recruitment officer he had discussed his dual nationality at length in the context of military service and that he was pressing his claim.

The President of the Office put his case to the Appeals Committee.

By a letter of 20 November 1992 he asked the President to change his designated home from Varese to Johannesburg and, in the event of refusal, again to treat his letter as an internal appeal under Articles 107 and 108 of the Service Regulations.

The Appeals Committee joined both appeals, which were numbered 16/92 and 44/92. In its report of 3 May 1993 it recommended that the President of the Office allow them, set aside the challenged decisions and take new ones provided that the complainant met the conditions in Article 60(2) of the Service Regulations.

By letters of 30 June the Director of Staff Policy told the complainant that the President of the Office had dismissed both appeals. The first was declared irreceivable on the grounds that he had failed to apply in time, and that is the decision he is impugning in his first complaint. The second was unfounded since his situation had not changed since the original designation of his home, and that is the decision he challenges in his second complaint.

B. The complainant puts forward similar pleas in both complaints. He told a recruitment officer that he was born in South Africa and had lived there for 29 years before taking a job in Italy, where he spent less than 4 years; that his family and his wife's lived in South Africa; that he had no kin in Italy; that he had real property in South Africa but not in Italy; and that he had done military service in South Africa. The officer he saw told him that he could not have his home in South Africa since it was not a Member of the EPO, and it was the officer who entered Varese on the application form. The Organisation failed to take account of his personal situation as it was required to do by Article 60(2) of the Service Regulations in the version that has applied since 1 July 1990 and by the case law (Judgment 525, in re Hakin No. 5). The Appeals Committee acknowledged that the Administration had wrongly determined his home on recruitment. The Organisation misled him, and to his detriment, since he may not take home leave with his family in the country with which he has the closest ties.

He submits that the Organisation is in breach of equal treatment: for example another staff member, who is both Italian and Canadian, was allowed to take home leave in Canada. There are other cases. The Appeals Committee was unanimous that the Administration was in breach of equal treatment and good faith by denying some what it granted to others. The Committee also took the view that the recruitment officer should, in discharge of the employer's duty of care to the employee, have given him accurate information about the rules on the designation of home.

Citing Judgment 676 (in re Brocard), he submits that his first internal appeal, which he lodged on 11 May 1992, was not out of time.

In his second complaint he asserts that his family status changed with the birth of his second child, which he says, has forged even closer links with South Africa.

In his first complaint he seeks:

(1) the quashing of the President's decision of 30 June 1993 to reject appeal 16/92;

(2) the designation of Johannesburg as his home as from the date of entry into service;

(3) payment of the difference between Varese and Johannesburg in the cost of travel for the home leave he took in 1992;

(4) an award of 10 guilders in damages for the moral injury he suffered as a result of the Office's unlawful policy and the wrong information he was given;

(5) an award of 10 guilders in damages for breach of equal treatment;

(6) an award of 7,000 guilders in costs.

In his second complaint he seeks:

(1) the quashing of the President's decision of 30 June 1992 to reject appeal 44/92;

(2) review of the designation of his home and the change of his home to Johannesburg for the purposes of Article 60(2) of the Service Regulations;

(3) 7,000 guilders in costs.

C. In its replies the Organisation asks the Tribunal to join the two cases on the grounds that they raise the same issues and the second complaint was filed solely to get round the fact that the first is time-barred and irreceivable. The complainant accepted Varese as his home on 9 November 1990, when he signed the EPO's offer of employment, and again on 1 February 1991, when he took up duty. To be receivable under Article 108(2) of the Service Regulations his first internal appeal should have been lodged three months after 1 February 1991, but he did not file it until 11 May 1992.

When he joined the Organisation he was given, like anyone else, a copy of the Service Regulations and a form of application for home leave stating that tickets had to be produced for home leave taken outside Europe. So he had all the information he needed and has only himself to blame for failing to appeal in time against the designation of Varese as home. It was up to him to provide full information on nationality and home, and he failed to do so.

In the Organisation's submission an official's home is usually in the "contracting State" of which he is a national since under Article 8(a) of the Service Regulations a candidate for appointment as a permanent employee must be a national of a contracting State unless an exception is authorised. The complainant was recruited because he was Italian.

There was no breach of equal treatment: the cases he cites were different in fact and in law from his own.

His second complaint has the same purpose as the first, and that is in breach of due process. The only difference between the two is the date from which he wants his designated home to be changed: as from his entry into service in the first and without retroactive effect in the second.

Review of the designation of home requires a special decision by the President of the Office on a reasoned request from the staff member and is an exceptional measure. It is taken only if there is a radical difference between the circumstances that existed when the home was originally designated and those that the employee relies on in seeking review. But the complainant's circumstances have not radically changed.

D. In his rejoinders the complainant develops his arguments. He maintains that the EPO was in breach of good faith: it knew full well after interviewing him on recruitment that South Africa, of which he was also a citizen, was the country he had the closest ties with.

He explains that though both complaints seek to correct the same mistake they challenge "two different decisions" taken on different grounds. He cites Judgment 1324 (in re Rivero), in which the Tribunal held that there is no difference in substance between the original designation and the review of "home" and that they cannot properly be made according to different criteria.

E. In its surrejoinders the Organisation sums up the pleas in its replies and submits that there is nothing in the complainant's rejoinders to make it change its stand.

CONSIDERATIONS:

1. After interviewing the complainant in Milan on 11 October 1990 the European Patent Organisation offered him by a letter of 18 October 1990 a post as an examiner at its office at The Hague. The letter said among other things that "for the purpose of Article 60 of the Service Regulations your home will be considered to be Varese", in Italy. Copies of the Service Regulations and other rules were enclosed. The complainant accepted the offer on 9 November 1990.

2. On 7 December 1990 and as from 1 July 1990 the Administrative Council of the Organisation amended Article 60 to read as set out in A above. The complainant took up duty on 1 February 1991. A form headed "Record of entry into service" said that his nationality was Italian and that the place of home leave was Varese. On 11 May 1992 he applied to the President of the Office for reversal of the original decision to treat Varese as the place of his home and for change to Johannesburg as from 1 February 1991. But by a note of 21 May 1992 a personnel officer told him that there was no reason to change retroactively the designation of Varese as his home. On 3 June 1992 he informed the Personnel Department that he was pressing his internal appeal of 11 May 1992. The appeal went to the Appeals Committee and was numbered 16/92.

3. On 20 November 1992 he wrote a letter to the President of the Office asking him "to review the designation of my home" and change it from Varese to Johannesburg. The President rejected his second request on 5 January 1993 and referred it to the Appeals Committee. The second appeal was numbered 44/92.

4. The Appeals Committee reported on each of the two appeals. Both reports were unanimous and had the same text: the Committee recommended that the President "allow this appeal, set aside the contested decision and take a new decision after a broad enquiry into whether the appellant fulfils the conditions laid down in Article 60(2)" of the Service Regulations. But by letters dated 30 June 1993 the President rejected both appeals, albeit on different grounds. He rejected appeal 16/92 as "irreceivable" and appeal 44/92 as "devoid of merit".

Joinder

5. Such are the two decisions the complainant is impugning in his two complaints and the claims they make are set out in B above. The Organisation asks the Tribunal to join

them on the grounds that they arise from the same set of facts. That is true and the Organisation's application is therefore allowed. But each complaint will be taken separately because the redress sought in each case is different: in one the complainant is seeking retroactive effect, but in the other not.

The first complaint

6. The Organisation submits that the first complaint is irreceivable insofar as it seeks the quashing of the decision on the complainant's place of home leave with retroactive effect from the date of entry in service. It points out that he acquiesced in the determination of Varese as his home on acceptance of the offer of employment on 9 November 1990 and again when he took up duty on 1 February 1991. Since he did not file his internal appeal until 11 May 1992 it was out of time under Article 108 of the Service Regulations, which sets a time limit of three months; he has therefore failed to exhaust the internal means of redress.

7. There is no need to determine whether the first complaint is receivable. Suffice it to say that what the complainant wants is a retroactive benefit that would be at variance with the terms of his original appointment, to which he consented and which designated Varese as his home. The EPO is therefore right to refuse any change in that determination as to the past.

The second complaint

8. The second complaint, seeking review of the original designation of home, rests on the pleas that are summed up in B above. The EPO observes that the President has wide discretion in reviewing the determination of home. It submits that owing to the exceptional nature of such a decision review will be warranted only if there is "a radical change between the circumstances which the complainant asserted or could have asserted when his place of home leave was originally determined, and the circumstances which he put forward to substantiate his request for review". The Organisation contends that the birth of a second child "cannot constitute an exceptional circumstance or a radical change in the complainant's situation". It adds in its surrejoinder:

> "Given the particular circumstances of the case at issue, the respondents leave it to the Tribunal to decide if said request should be granted, as in the complaint which gave rise to Judgement No. 1324".

9. In that judgment the Tribunal ruled on a case in which another employee of the EPO, Mr. Carlos Rivero, had sought the quashing of a decision by the Organisation rejecting his application for the change of his home. It held that the impugned decision rested "on a mistake of law, and the mistake lies in misinterpretation of the principle of equal treatment". The present complainant relies on circumstances of the same kind as those that Mr. Rivero cited in his pleadings and that Judgment 1324 set out under 3. The judgment concluded that Mr. Rivero's situation was different neither in law nor in fact from that of the other employees with dual nationality whose cases he had cited, including new employees who had had their "home" automatically designated outside the territory of member States.

10. There is no material difference between the complainant's case and Mr. Rivero's. Both hold dual nationality; were born outside Italy; were brought up in the country of their birth and lived there until well over the age of 20; travelled and worked in Italy for a few years; have kin living in the country of their birth; and are married to citizens of that country.

11. The Tribunal reaches the same conclusion about the present complainant as it did about Mr. Rivero and repeats what it said in Judgment 1324 under 9:

> "It would offend against the principle of equal treatment that the recruit who has strong ties with the country of one of two nationalities should get the automatic designation of a place in that country as "home", while in identical circumstances another employee is refused designation of his home in that country simply because he is seeking review of a determination already made."

Since the distinction does not hold in law the impugned decision cannot stand.

12. The Tribunal is satisfied on the evidence before it that South Africa is the country with which the complainant has the "closest connection" within the meaning of Article 60(2) of the Service Regulations. He was born and brought up and followed primary and secondary education in that country. He lived there until the age of 29, save six years when he was at university in the United Kingdom. His parents and brother live in South Africa. His wife is South African and his wife's family live there. He has real property in Johannesburg.

Those circumstances are sufficient to warrant the designation of Johannesburg as his home. The fact that he has had another child since joining the EPO makes no difference. The conclusion is that he qualifies for review of the determination of his home under Article 60(2) and his home must be changed accordingly.

13. Since he has succeeded in his second complaint he is entitled to an award of costs, and the amount is set at 3,000 guilders.

DECISION:

For the above reasons,

1. The first complaint is dismissed.
2. The President's decision of 30 June 1993 rejecting appeal 44/92 is quashed.
3. The complainant's designated home shall be changed from Varese to Johannesburg.
4. The Organisation shall pay him 3,000 guilders in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

José Maria Ruda

E. Razafindralambo

Michel Gentot

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re DIOTALLEVI No. 2 and TEDJINI No. 2 Judgment 1365
(Applications for execution)

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 1272 filed by Miss Marina Diotallevi and Mr. Patrice Tedjini on 17 September 1993, the replies of 5 January 1994 from the World Tourism Organization (WTO), the complainants' rejoinders of 30 March and the Organization's surrejoinders of 19 May 1994;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. By Judgment 1272 of 14 July 1993 on Miss Diotallevi's and Mr. Tedjini's first complaints the Tribunal set aside a decision by the Secretary-General of the World Tourism Organization to appoint Mr. Scott Wayne as Director of Communications and ordered the Organization to resume the process of appointment to his post. Shortly before that judgment went out the WTO appointed Mr. Wayne, whose original contract expired on 9 June 1993, adviser on press and communications. The complainants' applications for that post were turned down by decisions notified to them on 23 June 1993.

2. Judgment 1272 allowed the first complaints, but the complainants have filed these applications in the belief that it has not been duly executed.

3. Since both applications raise the same issues they are joined to form the subject of a single ruling.

4. The action taken on Judgment 1272 is set out in memoranda of 31 August 1993 from the Deputy Secretary-General to the complainants. The memoranda say that they have each

been sent a cheque on 3 August 1993 to meet the award of costs; that the Organization is willing to remove from their files any documents about them written or annotated by Mr. Wayne between July 1991 and June 1993; and that it is sorry about the breach of procedure; but it sees no point in resuming the process of appointment to Mr. Wayne's post, his appointment to a new post having been notified on 23 June 1993 and become final. The Deputy Secretary-General says:

> "As to the procedure for appointment of Mr. Wayne to his previous post, I am sure you will agree it cannot be resumed: his duties have ended and his later appointment to a post in the Organization was decided by due process in which you took part and your application was duly considered in accordance with the wish you expressed in your submissions to the Administrative Tribunal of the ILO to see proper respect for the rules on appointments in this Organization."

5. In the complainants' submission the Organization has flouted Judgment 1272 by refusing to resume the procedure for appointment to the post; they do not have to acquiesce in the decision to appoint Mr. Wayne in June 1993 - before the judgment - because they had reserved their position in that respect; and that decision was just a tactic to make it harder to execute the judgment. They seek the quashing of the decisions of 31 August 1993 refusing to execute the judgment in full, the resumption of the process of appointment to the post, awards of damages and costs.

6. Contrary to what they contend, the decision of June 1993 created a new situation. Although Judgment 1272 set aside Mr. Wayne's appointment in July 1991 as Director of Communications, it had neither the purpose nor the effect of barring a lawful decision by the Organization to fill any post it might care to create in Communications. When Mr. Wayne's two-year contract ended, and before Judgment 1272 was delivered, the Secretary-General created a post for an adviser on press and communications and appointed Mr. Wayne to it by a procedure which prompted no timely challenge. That decision did not of course give effect to the judgment because it came earlier, but the situation it gave rise to is material. The complainants may not properly rely on the mere "reservations" they entered when they themselves applied for the new post. Judgment 1272 does not require the Organization to resume the procedure that led to the decision of June 1993. On that score the complainants are wrong.

7. They further object to the Organization's failing to execute point 2 of the operative part of the judgment, which ordered resumption of the procedure for filling the post of Director of Communications.

8. The Organization pleads that it could not resume the process of appointment since "Mr. Wayne's previous contract had expired on 9 June 1993 ... and there was obviously no point in resuming a procedure for an appointment that, whatever the judgment had ruled, had ceased to exist in law". But there the Organization shows misunderstanding about the effect of a judgment. The quashing of Mr. Wayne's appointment in 1991 being *res judicata*, it had a duty under the judgment to resume the process from the date of the unlawful appointment, regardless of the new situation arising from the expiry of Mr. Wayne's appointment and his assignment to a post as adviser. The complainants are therefore right in contending that the Organization was at fault in refusing to carry out the process properly.

9. Yet any satisfaction that the complainants might derive from resumption of the procedure would be merely formal, Mr. Wayne having been appointed in June 1993 and the position thus having changed. Such resumption being inadvisable, the Tribunal exercises the option that Article VIII of its Statute allows of not setting aside the decisions of 31 August 1993. But the Organization's refusal of resumption has caused the complainants actionable injury. Their refraining from seeking damages in their first complaints does not bar their claims in the present applications to damages for the Organization's failure to execute Judgment 1272. It is the defendant's own fault that it may not now make good its mistakes, and the resulting moral injury warrants awards of damages which are set at 10,000 French francs for each complainant.

10. Since the complainants succeed they are entitled to costs and the Tribunal awards each of them 5,000 French francs.

DECISION:

For the above reasons,

1. The Organization shall pay each of the complainants 10,000 French francs in final damages.
2. It shall pay each of them 5,000 French francs in costs.
3. Their other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re KIGARABA (No. 3) Judgment 1366

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 19 August 1993, the UPU's reply of 24 September, the complainant's rejoinder of 4 November and the Union's surrejoinder of 9 December 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 3.10 of the Staff Regulations and Rule 111.3.2 of the Staff Rules of the International Bureau of the UPU;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Tanzania, is employed by the UPU and his career is summed up in Judgment 1188 under A.

When he joined the Personnel Section in 1983 Regulation 3.10.5.C.a and c of the Staff Regulations of the International Bureau of the UPU, which sets the amount of the education grant, read as follows:

> "a In the case of attendance at an educational institution outside the area of the duty station, the amount of the grant shall be:
>
> ...
>
> ii where the institution does not provide board, 1100 US dollars plus 75 percent of the first 3000 US dollars of the cost of attendance, plus 50 percent of the next 1000 US dollars of such costs and 25 percent of the next 1000 US dollars up to a maximum grant of 3000 US dollars per scholastic year."

> "c When, for the purpose of applying the scale of reimbursements approved for the education grant, the expenses incurred by a staff member in a currency other than the US dollar are converted into US dollars, the official United Nations rate of exchange used shall be whichever of the following two rates is the higher: that which was in force at the date when the existing scale of reimbursements came into effect or that in force at the date when the reimbursement is made, the same rate being used in converting the US dollar amount of the reimbursement into the currency in which it is to be paid."

The complainant was entitled to the education grant since two of his four children were at school in Tanzania. He usually applied for an advance and the Union paid any balance or recovered any sum in debit when he sent in the final yearly expense sheet. Several currencies being involved - the Swiss franc, the Tanzanian shilling and the United States dollar - the question arose as to which exchange rate should be applied. The matter was settled by office notice 22/1979 of 30 March 1979, which states in paragraph 8(c):

> "When converting into US dollars expenses incurred in a currency other than the US dollar, the rate of exchange used shall be either that which was in force at the date when the existing scale of reimbursements came into effect (1 January 1977) or that in force when the reimbursement is made, whichever of the two is higher. The same rate shall be used in converting the US dollar amount of the grant into the currency in which it is to be paid. ..."*

In 1984 the regressive system of refund was dropped and the exchange rate referred to in Regulation 3.10.5.C.c - known as the "minimum rate" - was made the rate of 1 March 1983. In 1989 3.10.5.C.c was deleted.

In a minute of 3 October 1990 to the Head of the Division of Legal and Administrative Affairs the Head of the Personnel Section (Division I) stated that because of the "minimum rate" in effect on 1 March 1983 the amounts the complainant had received were too high. The Assistant Director-General then decided that when drawing up expense sheets for the 1989 school year officials should use only one exchange rate, namely the United Nations operational rate in force when the advances were paid. The complainant agreed.

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* Registry's translation.

By a minute of 27 February 1992 the Director-General set up a committee of enquiry to see whether the complainant had received more than his due to cover school fees and if so to determine by how much and suggest ways of recovery.

In its report of 17 July 1992 the committee of enquiry concluded that from 1983 to 1990 the complainant had been overpaid 32,222.40 Swiss francs but repayment might be limited to sums overpaid from 1986 to 1990, or 27,779.55 Swiss francs.

The complainant commented in a letter of 31 August 1992 and on 28 September 1992 the Director-General ordered him to pay back the smaller amount.

In a letter of 22 October 1992 the complainant asked the Director-General to reconsider. By a letter of 11 November the Director-General upheld the decision and told him that from 1 December 1992 900 francs would be deducted from his monthly salary.

In a letter of 17 November the complainant asked the Director-General to reduce the amount to 200 a month on the grounds of other financial commitments. The Director-General refused in a letter of 11 December.

On 4 December 1992 the complainant appealed to the Joint Appeals Committee under Staff Rule 111.3.2 against the decision of 11 November.

In its report of 21 April 1993 the Appeals Committee recommended that the Director-General reconsider his decision to recover overpayments from 1986 to 1988, there being doubt as to whether there was prescription for recovery, and held that it would not be reasonable to demand recovery of the sums overpaid for 1989 and 1990, except for 450 dollars.

In a letter of 28 May 1993, the impugned decision, the Director-General rejected the Committee's first recommendation, accepted the second - so that the complainant still owed 27,872.42 francs - and upheld his decision to deduct 900 francs a month from salary.

B. The complainant submits that he has no debt to the UPU.

That the rules are unclear is plain from the committee of enquiry's taking five months to report and the Appeals Committee's meeting three times. According to general principles of law someone whom a decision concerns must get the benefit of any doubt.

He says that he merely applied in good faith arrangements that were already in use to reckon the benefits due to other staff.

None of the many amendments to Regulation 3.10 being retroactive, his statements for the years 1986 to 1989 were in line with the material rules. So was the one for the 1989-90 school year since the 1989 revision of 3.10 did not ordain any particular method of currency conversion. The balance he owed was approved twice, in July 1989 and December 1990, and should not have been worked out again in January 1992 on the strength of a new exchange rate. The method advocated by the committee of enquiry is arbitrary in that it bears more heavily on staff from countries with a weak currency. It should not apply to 1990-91, let alone earlier years.

The complainant submits that the time limit the Union applied for reimbursement appears neither in its own rules, which say nothing on the subject, nor in those of other organisations of the United Nations common system.

He asks the Tribunal to quash the Director-General's decision of 28 May 1993 insofar as it orders repayment of amounts he received in education grant from 1986 to 1988 and refuses to reimburse him 4,119.30 or 4,068.75 Swiss francs; to order the Union to repay him, with interest at 10 per cent a year, the amounts deducted from salary since 1 December 1992 and 4,119.30 or 4,068.75 Swiss francs; and to award him moral damages and costs.

C. In its reply the UPU states that the complainant gained for years from the depreciation of the Tanzanian shilling by wrongly treating the "minimum rate" as if it were a fixed or ceiling rate and using it systematically instead of the United Nations operational rate in force at the dates of his final expense sheets. Though the grant is supposed to cover only three-quarters of school fees, the complainant was repaid his actual expenses up to thirteen times, and on one occasion, as the Joint Appeals Committee said, seventeen times what he had actually spent.

According to the text of Regulation 3.10.5.C.c as in force from January 1983 only the amounts making up the "scale of reimbursements approved" referred to in c are subject to the method of currency conversion prescribed therein. The United Nations operational exchange rate should have been used for expenses actually incurred.

There is no evidence that the complainant acted in good faith; nor do the facts square with the allegation that his predecessors misinterpreted the applicable rules.

No new provision or interpretation of the rules has been made retroactive, and the sole purpose of recovery of the overpayments is to offset the financial consequences of the mistakes he made from 1986 onwards.

D. In his rejoinder the complainant develops his pleas. He argues in particular that by approving the statements he submitted other staff members accepted his interpretation of Regulation 3.10, which was the same as that of former UPU officials. Other organisations either have a time limit of one or two years or do not recover overpayment in the event of a mistake.

E. In its surrejoinder the Organisation presses its pleas and maintains that the rules on reimbursement left no room for interpretation. The complainant deliberately blurred the distinction between the minimum rate and the United Nations operational rate, and the Director-General was alerted only by the external auditor. The Union's right to recover overpayment is not subject to prescription. In the United Nations common system only the World Intellectual Property Organization has such a time limit, and it is irrelevant to this case.

CONSIDERATIONS:

1. The complainant joined the staff of the Union in 1983 at grade P.2. In 1986 he was promoted to first secretary at grade P.3 in the Personnel Section and there he was put in charge of claims to the refund of education expenses.

2. This case is about the UPU's claim to recovery of sums it says he has been paid over and above his due under Regulation 3.10 in respect of education expenses for two of his children who were at school in Tanzania. To meet such expenses the complainant used to apply for an advance and any balance was made over when he sent in his final yearly expense sheet. In 1990 the Personnel Section came to the view that by applying the rate of exchange in force at 1 March 1983 he had got more in reimbursement and later in advances than he had actually spent on the education of his children. Applying the single United Nations operational rate that was in force when advances were paid for the 1989 school year, the UPU reckoned at 9,046.75 Swiss francs the amount to be paid back by the complainant for that year. At the time he agreed to the method of reckoning.

3. On 27 February 1992 the Director-General decided to set up a committee of enquiry to check the education expenses refunded to the complainant. In its report of 17 July 1992 the committee concluded that he had been paid 32,222.40 francs more than his due but that recovery might be confined to the school years 1986 to 1990 and he would then have to pay back only 27,779.55 francs. Having been asked to comment on the committee's conclusions, he rejected them in a letter of 31 August 1992. The Director-General nonetheless decided on 28 September 1992 that he must repay the 27,779.55 francs.

4. On 22 October 1992 he made a request for review but the Director-General upheld the decision on 11 November 1992 and set at 900 francs the amount to be docked from his monthly salary, starting in December 1992. On 17 November he asked the Director-General to reduce the monthly deduction to 200 francs but that was refused by a decision of 11 December 1992. On 4 December he lodged an appeal with the Appeals Committee against the decision of 11 November 1992 insofar as it confirmed that he was to pay back sums in excess of his entitlements. On 21 April 1993 the Committee submitted recommendations that were largely in his favour. But the Director-General rejected the complainant's claims by a decision of 28 May 1993, the one he is impugning.

5. The nub of the dispute is the choice of the rate of exchange to be applied in reckoning the amounts due to the complainant as education expenses for the school years 1986 to 1990. The material rule is Regulation 3.10.5.C.c of the Staff Regulations, which at 1 January 1983 read as set out in A above. As from 1 January 1984 the text was amended: the words "that which was in force at the date when the existing scale of reimbursements came into effect" were replaced with the words "that which was in force at 1 March 1983". The Administration stopped referring to this rate, which was known as the "minimum rate", when 3.10.5.C.c was deleted in 1989.

6. The complainant accepts the method of reckoning used for 1989, the "minimum rate" having by then been dropped. His main objection is that after getting the committee of enquiry's report the Union applied, for the purpose of reckoning his entitlements prior to 1989, the United Nations operational exchange rate which had prevailed at the time and which was higher than the one prevailing at 1 March 1983.

7. That objection fails. It is plain from the material text that the rate prevailing at 1 March 1983 is to apply only if higher than the one that prevailed at the date of repayment. The rate of exchange of the United States dollar stood at 1 March 1983 at only 9.56 Tanzanian shillings whereas the successive rates prevailing at the dates of repayment from 1985 to 1990 ranged from 25 to 193.3 shillings. Short of

mistaking the "minimum" for the "maximum" rate the complainant may not properly contend that the rate prevailing at 1 March 1983 should invariably have been used to reckon repayments to be made after 1984.

8. He alleges that it was UPU practice to apply the 1983 "minimum rate" and in support he relies on the fact that senior officers of the Personnel Section checked and approved his expense sheets and other staff members got the same benefits as he.

9. The UPU denies such practice. Besides, as the Joint Appeals Committee pointed out, there is a rule that the whole common system of the United Nations abides by and that the International Civil Service Commission has cited more than once, for example in a report of 1978 (No. 30 A/33/30, paragraph 222). That rule is to repay education expenses only in part. Yet according to the Committee, because of his misreading of Regulation 3.10.5.C.c, the complainant got far more than his actual expenses. At least once he got seventeen times as much as what he had had to spend. None of those statements does he challenge. Since as officer in charge of claims to education expenses he drew up his own expense sheets, he was not free to seek refuge in the senior officers' approval or to remain silent about a discrepancy to his own advantage.

10. He seeks to justify his behaviour by pleading that other staff members had done the same. The plea fails because equality in law does not embrace equality in the breach of it. In any case, as the committee of enquiry observes, the Director-General ordered the same treatment for the others as for the complainant.

11. The complainant then alleges that the amendments to Regulation 3.10 could not be retroactive. He is wrong. The rule against retroactivity is not at issue here since no new provision or interpretation of the rules on the method of calculation were made retroactive.

12. What is at issue is the recovery of overpayments; and the complainant, as was pointed out above, must have been aware of the patent disproportion between the advances he was receiving and the education expenses he had actually incurred. So he may not properly plead any mistake in interpretation.

13. He has a subsidiary plea that there is a time limit for the recovery of overpayments. Though he acknowledges that there is none in the UPU's rules, he argues that the Union should follow the practice of the United Nations and the common system, which he says limits the period for which overpayments may be recovered to the two years or even to the one preceding the discovering of the mistake. He believes that in his case limiting the period to one year would be quite warranted.

14. The Union observes that any payment made in error may be recovered but does not challenge the rule that an obligation may lapse with time: it claims recovery only of overpayments since 1986, it has thereby waived some of the sum due and it has not demanded interest.

15. In the circumstances the time limit the Union has set is much to the complainant's advantage and his plea under this head therefore fails.

16. Since his main claim to the quashing of the impugned decision does not succeed, neither does any of his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re OZORIO (No. 4) Judgment 1367

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Edmund Peter Ozorio against the World Health Organization (WHO) on 28 July 1993 and corrected on 30 July, the WHO's reply of 28 October, the complainant's rejoinder of 24 November 1993 and the Organization's surrejoinder of 28 January 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article VII of the WHO Staff Regulations, Staff Rules 860 and 1230 and paragraph 50 of the preface and paragraph VII.5.60 as in force up to 15 June 1992 of the WHO Manual;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article VII of the WHO Staff Regulations reads:

> "7.1 Subject to conditions and definitions prescribed by the Director-General, the Organization shall pay the travel expenses of staff members and, in appropriate cases, their dependants ... upon separation from the service.
>
> 7.2 Subject to conditions and definitions prescribed by the Director-General, the ... Organization shall pay removal costs for staff members ... upon separation from the service."

Staff Rule 860 says:

> "In no case shall a staff member be given any cash payment in lieu of exercising any entitlement under this section. Any entitlement to repatriation travel or removal which is not exercised within one year of the date of termination of the appointment shall be forfeited except upon express approval by the Director-General of an extension".

Until 15 June 1992 the text of Manual paragraph VII.5.60 was as set out in 1 below: removal on repatriation must begin within one year of termination, though the Chief of Personnel might authorise exceptions.

The complainant, a citizen of the United States who was born in 1928, joined the Organization's Regional Office for the Americas at Washington in 1958. From 1972 to 1977 he served in its office in New York for liaison with the United Nations and from 1977 until 1988 he worked at headquarters in Geneva, where he held a post as information officer at grade P.4.

Having retired on 30 November 1988 he sent the Director of Contract Administration in the Division of Personnel a memorandum of 14 May 1990 asking for "a delay in the removal of my household goods".

By a memorandum of 28 May the Director extended to November 1990 the duration of his entitlement to payment of the costs of removal.

In a memorandum dated 12 December 1990 he applied for another extension of one to six years, the actual limit to be left open until his wife, a locally recruited employee of the Office of the United Nations High Commissioner for Refugees (UNHCR), also in Geneva, decided whether to retire early at the age of 55 or wait until she was 60.

By a memorandum of 9 January 1991 the acting Director of the Division of Personnel gave him a "final" extension of one year until 30 November 1991.

By a letter of 19 July 1991 he asked the Director of Personnel to work out a solution.

In a letter to him of 26 August the Director confirmed as "final" the decision not to grant any extension beyond 30 November 1991.

On 26 October 1991 he filed an appeal under Staff Rule 1230.1.2 on the grounds of incomplete consideration of the facts. In its report of 8 April 1993 the Board recommended that the Director-General should "reconsider" the matter. By a letter of 1 May 1993, which he impugns, the Director-General gave him until 1 May 1995 to claim any costs of removal.

B. The complainant submits that the decision of 1 May 1993 was an improper exercise of discretion. He puts forward three pleas.

The first is that the Director-General committed a mistake of law. His discretion under Staff Rule 860 and that of the Chief of Personnel under Manual paragraph VII.5.60 are unfettered. So the Administration was wrong to rely on an unpublished policy approved in 1972 which limited extension of the period for claiming the costs of removal to three years after separation. Inasmuch as the Manual, according to paragraph 50 of its preface, is "the single unified source of information on the policies established by the Director-General", a policy which the Administration fails to publish cannot extinguish a right conferred by the rules.

In any event the reason for the grant of wide discretion under Rule 860 and Manual paragraph VII.5.60 is that there is no foreseeing all the contingencies that may occur. Instead of relying on an unannounced "policy" the Director-General had a duty to weigh the relevant facts, foremost among them being his wife's employment situation.

His second plea is that the Director-General's failure to consider his wife's situation amounted to a mistake of fact.

He alleges, lastly, misuse of authority. The Director-General gives no reasons in the decision of 1 May 1993 for cutting the entitlement off two years later. It would not have cost the Organization a penny to defer his entitlement for another 19 months; yet the loss to him and his wife if she took early retirement or if he forfeited the entitlement might prove substantial. The Administration's position was, he says, at odds with current trends in the employment of women.

He invites the Tribunal to set aside the impugned decision and order a new one taking account of the actual date of his wife's retirement. He also claims 5,000 Swiss francs in costs.

C. In its reply the WHO submits that the complaint is irreceivable. The "final action" within the meaning of Rule 1230.8.1 was the one the acting Director of Personnel gave notice of on 9 January 1991. Although the complainant had sixty calendar days under 1230.8.3 to state his intent to appeal he did not do so until 26 October 1991, long after the time limit had expired.

In subsidiary argument the Organization seeks to refute his pleas on the merits. Under the rules a staff member's entitlement runs out one year after separation. For twenty years the Director-General's practice has been to grant extensions of up to three years after separation "only in the most unusual circumstances involving real hardship". Such a policy is a safeguard against misuse of authority: preferential treatment of the complainant would have impaired the equality that staff are entitled to.

The WHO observes that it let the complainant have the maximum allowable period in which to claim payments. Far from misusing authority the Director-General went far to meet his wishes by approving payment of the repatriation grant in 1988 and repatriation travel in 1989 even though he had not left his duty station.

D. In his rejoinder the complainant presses his pleas. On receivability he observes that his letter of 19 July 1991 was a request for reconsideration under Rule 1230.8.1 of the decision of 9 January. The Director of Personnel having refused in a letter of 26 August, which stated "this is a final decision", he filed notice of appeal on 26 October 1991, inside the sixty-day time limit.

As to the mistake of law he contends that a rule is enforceable only from the date at which it is brought to the notice of those it applies to. Even if others had borne the brunt of the WHO's omission to publish rules, that was no reason for him to put up with unlawful treatment: as the Tribunal held in Judgment 767 (in re Cachelin), "equality in the law does not embrace equality in the breach of it".

The reply does not explain, he points out, why the Director-General chose 1 May 1995 as the ultimate deadline: the lack of any "rational" connection between that date and the circumstances of the case shows that the exercise of discretion was "fanciful and arbitrary".

E. In its surrejoinder the WHO observes that although "dilatory correspondence" from the complainant caused it to reject his counter-proposals the final decision was plainly that of 9 January 1991. What he wants is preferential treatment in breach of an established policy that the WHO notifies to staff in its "preparation for retirement" programme.

CONSIDERATIONS:

Receivability

1. The complainant retired from the WHO on 30 November 1988. According to WHO Manual paragraph VII.5.60 as in force at the time:

> "Removal on repatriation must begin within one year of the date of termination. Exceptions to these limits may be authorized by the Chief of Personnel on the basis of written justification and provided that the cost to the Organization is not increased."

The paragraph was amended as from June 1992 to allow "exceptions to this limit up to a maximum of two further years (one year at a time)".

2. On 14 May 1990 the complainant applied for postponement of the time limit allowed for the removal of his household goods on repatriation. On 28 May the Organization agreed to postpone the time limit until 30 November 1990. It added that its liability would "be limited to the cost in operation as at 30 November 1989".

3. On 12 December 1990 he applied for a further extension on the grounds of his wife's retirement from employment at the Office of the United Nations High Commissioner for Refugees in Geneva, where she held an indefinite contract. He made no mention of any date of retirement because if she retired early at the age of 55 it would be in 1991 whereas if she retired at 60 it would be in 1996. The complainant asked that the date be left open.

4. In his reply of 9 January 1991 the acting Director of the Division of Personnel agreed "to a final delay of one year until 30 November 1991".

5. On 19 July 1991 the complainant wrote to the Director of Personnel asking him to take a decision in the exercise of his discretion in the light of the fact that in the United Nations system cases like his were not unusual and would become more common. He pointed out that the Organization would incur no additional cost by consenting to extension.

6. The Director replied on 26 August 1991 that it was "incorrect and unacceptable that your spouse's working situation should intervene in the contractual relationship between you and the Organization" and although in one case an extension of time had been granted beyond what the current practice allowed no exception had been permitted since the

Director-General had formulated the policy setting a time limit. The Director concluded:

> "... you cannot be granted an extension for the removal of your household effects beyond the third year from the date of termination of your appointment. This is a final decision".

7. On 26 October 1991 the complainant appealed to the Board of Appeal against "the final decision of the Administration as contained in the letter of 26 August". The Organization argued before the Board that the final decision was dated 9 January 1991 and the appeal was therefore time-barred. But the Board held that, being based on the letter of 26 August 1991, the appeal was receivable.

8. The Organization argues that the internal appeal was submitted to the Board of Appeal long after the time limit of sixty days for appealing against a "final action" had expired, the "final action in the sense of staff rule 1230.8.1" being "embodied in the letter of the Director of Personnel dated 9 January 1991". The rule reads:

> "No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

The complainant points out that the WHO's letter of 28 May 1990 alluded to the possibility of "further final extension" and that the reference in its letter of 9 January 1991 "to the granting of a final delay of one year" was merely an indication of the last extension that the WHO was willing to grant, not a "final" action within the meaning of Rule 1230.8.1. The issue therefore is whether the letter of 9 January 1991 or the one of 26 August 1991 is to be taken as the "final action" by the Director of Personnel.

9. The letter of 9 January 1991 granted a "final delay" to the complainant for the removal of his household effects. What Rule 1230.8.1 requires is that the staff member try "all the existing administrative channels" and no time limit is set for doing so. The complainant's letter of 19 July asked for an exercise of discretion by the Director of Personnel and, if needed, "on the part of the Director-General". So it amounted to a request to try an "administrative channel". The reply of 26 August 1991 to that letter answers the complainant's argument about the retirement of his wife and concludes "this is a final decision".

10. Since the Organization states the letter of 26 August 1991 as "a final decision", the letter of 9 January 1991 cannot also have been such a decision and it is clear from the terms used that the Director-General himself took the view at the time that the letter of 9 January 1991 had not been the last word. The conclusion is that the letter of 26 August 1991 was the "final action" taken by the Organization, that the internal appeal complied with the time limit in Rule 1230.8.1, that the complainant has therefore exhausted the internal means of redress, as Article VII(1) of the Tribunal's Statute requires, and that his complaint is receivable.

The merits

11. The dispute is about the time in which a staff member of WHO may exercise his right to removal of his household effects at the Organization's expense upon retirement. Before the complainant retired on 30 November 1988 the Organization agreed that he was entitled to payment of the costs of removal of his household effects. It granted him two extensions of the time limit for removal, the first until 30 November 1990 and the second until 30 November 1991. After the first extension he asked that the time limit be left open until his wife retired. But the Organization refused to extend the time limit beyond 30 November 1991. After correspondence the Director of Personnel confirmed on 27 November 1991 the decision in his letter of 26 August 1991.

12. In its report of 8 April 1993 the Board of Appeal held that the Administration had narrowly interpreted the text of the Manual to the complainant's detriment and that the Director-General had not been well advised in the exercise of his discretion. It recommended that the Director-General reconsider the complainant's claim.

13. By a letter of 1 May 1993 the Director-General communicated his decision. Though he said he rejected the Board's interpretation of the Manual paragraph he went on:

> "I have, however, accepted the recommendation of the Board and hereby allow you, exceptionally, to remove your personal household effects not later than two years from the date of this decision. You must note, however, that WHO's liability will be limited to the cost in operation as at 30 November 1989."

The Director-General has thus extended the time limit until 1 May 1995. That is the decision now impugned.

14. The Tribunal holds that it is the text of Manual paragraph VII.5.60 as in force when the complainant retired that must be applied. The impugned decision is therefore a discretionary one and the Tribunal may exercise only its limited power of review.

15. The complainant contends that the decision is flawed because it fails to state the reasons for the new time limit of 1 May 1995 and to meet his own and his wife's legitimate wishes. In his view the decision is self-contradictory because, while "the Director-General purported to accept the recommendation of the Board of Appeal, he expressed his disagreement with the Board's conclusions". The Organization rejects those arguments and states that the Director-General has "made proper use of his discretionary power".

16. The Director-General's decision is arbitrary, not just because it fails to state the reasons for choosing the date of 1 May 1995 as the new deadline for the refund of the costs of removal, but because it gives no consistent reply to the complainant's claim. It is a wrong exercise of discretion.

17. For the foregoing reasons the Director-General's decision of 1 May 1993 is set aside. The case is sent back for a new decision by the Director-General.

18. Since the complainant has succeeded he is entitled to costs, and the amount is set at 4,000 Swiss francs.

DECISION:

For the above reasons,

1. The Director-General's decision of 1 May 1993 is quashed.

2. The case is sent back to the Organization for a new decision on the time limit for the refund of the costs of removal of the complainant's household goods.

3. The Organization shall pay the complainant 4,000 Swiss francs in costs.

In witness of this judgment Mr. José María Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

José Maria Ruda
E. Razafindralambo
Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re AYMON, BALL (No. 2)
and BORGHINI (No. 2)

Judgment 1368

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Marcel Aymon and the second complaints filed by Mr. Derek Ball and Mr. Michel Borghini against the European Organization for Nuclear Research (CERN) on 24 June 1993, CERN's replies of 13 October 1993, the complainants' single rejoinder of 28 February 1994 and the Organization's surrejoinder of 29 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Rules IV 1.01, VI 1.01 and VII 1.03 and Regulations R IV 1.01 and R VII 1.02 of the CERN Staff Rules and Regulations;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The method used at CERN, which is in Geneva, for the periodical adjustment of staff pay is explained in Judgment 1329 (in re Ball and Borghini) under A.

On 16 December 1992 the Organization's Finance Committee received from the Management a paper headed "The cost variation index for 1993". It reflected agreement with the Staff Association and proposed an average pay increase of 3.39 per cent - matching the rise in the Geneva consumer price index - and a further 1.5 per cent increase that was the outcome of negotiation between the Director-General and the Association in the summer of 1990. The Committee failed to reach agreement on the paper and no other proposal won the required majority, but there was a simple majority in favour of a lower increase, of 2.4 per cent.

At a meeting on 17 December 1992 the Committee of the CERN Council took up the above proposals and recommended to the Council the 2.4 per cent pay increase.

On 18 December the Council endorsed the Committee's recommendation and put a total figure on the staff budget for 1993. In a statement of even date the chairman of the Staff Association, who had asked that the Association be consulted before any final decision was taken, protested against the method used and the outcome.

The Council's decision was announced to the staff in the CERN Bulletin for the week of 11 January 1993 and was reflected in their pay slips for January.

On 10 and 17 March 1993 the complainants lodged an internal appeal against the Council's general decision of 18 December 1992 and the individual decisions in their January pay slips. Two of them, Mr. Ball and Mr. Borghini, said that they were appealing both "as elected staff representative[s] and individually". They asked for leave to go straight to the Tribunal if the appeal was rejected. By letters of 26 March 1993 - the impugned decisions - the Director-General informed them of the rejection of the appeal and gave them such leave.

B. In the complainants' submission the Council's decision of 18 December 1992 shows several flaws.

First, neither the five-yearly salary review in 1990 nor the annual reviews in 1991 and 1992 that preceded the impugned decision were done properly.

The Staff Association was constantly kept out of the decision-making process, though Rule VII 1.03 and Regulation R VII 1.02 require the Director-General to consult the staff on general questions concerning them. In June 1990 the Council did not endorse the proposals from the Tripartite Advisory Committee on Conditions of Employment but merely approved a new method of negotiating. It based its decision of 14 December 1990 not on the outcome of the negotiations in the summer of 1990 but on the motion of a single delegation. In the annual review for 1991 it disregarded the figure that the Management and the Staff Association had agreed upon. It did so again in 1992, when the Council and its subsidiary bodies declined to let the Staff Association have its say before they reached decisions. By discounting the outcome of the negotiations between the Management and Staff Association - though it had itself asked for such negotiations - the Council acted in breach of good faith and the principle of stability in law.

That is borne out by what the Organization's legal adviser said at a meeting of the Committee of the Council on 17 March 1993: he advised caution over the term "negotiation" on the grounds that it might fetter the Management's authority to take decisions.

The Council's vote on 20 December 1991 was improper. Citing letters of 27 November 1992 from two delegations, the complainants further challenge the lawfulness of the decision of 18 December 1992 on the grounds that pressure was exerted to carry it.

No reasons were stated for the general decision on staff pay or the Director-General's final decisions.

The complainants' second plea is that CERN was in breach of the rules and the substantive criteria for adjusting pay which it had itself set in 1979 and consistently applied ever since.

Although the Council may determine salary scales and review them from time to time - indeed Rule IV 1.01 says it shall - and exercises discretion in doing so, the competent authority is bound, once it has laid down the procedure and method to be followed in adjusting pay, itself to comply with them. Yet four times - in 1989, 1990, 1991 and 1992 - the Council's reckoning of staff pay has been quite arbitrary and ignored the method it approved in 1979. As a result the complainants have, they allege, lost at least 7 per cent in earnings over four years. In 1992 the procedure was even more seriously flawed than in earlier years since it discounted the first factor of reckoning, trends in the cost of living at Geneva. Taking account thereof is a "firm" and binding rule. So CERN has failed in its duty to treat staff fairly and in good faith.

The complainants ask the Tribunal to quash the Director-General's decisions of 26 March 1993 and award them costs.

C. In its replies CERN challenges the receivability of Mr. Ball's and Mr. Borghini's complaints insofar as they purport to be acting as members of the Staff Association and of all three complaints insofar as they impugn the Council's decision of 18 December 1992. According to both Rule VI 1.01* and the case law a complaint is receivable only insofar as it challenges an individual decision applying a general one. And the indirect challenge to the individual decisions applying the

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* Rule VI 1.01 says that:

"Every member of the personnel shall have the right to appeal against any decision of the Director-General concerning himself."

Council's decisions of 1989, 1990 and 1991 is out of time. To let the complainants challenge the lawfulness of the Council's decisions would seriously impair stability in law within the Organization.

On the merits CERN submits that none of the complainants' pleas is sound.

Rule VII 1.03 and Regulation R VII 1.02 require consultation, not between Council but only between Director-General and Staff Association. So the Council's decisions of December 1991 and December 1992 were not in breach of those provisions.

When it asked the Management on 22 June 1990 to start direct negotiation with the staff the Council was not relinquishing its sovereign decision-making authority. The legal adviser's statement of March 1993 was on a different matter and immaterial to this case.

The Council carried out the voting properly in 1991 and in 1992. The letters from the two delegations - which in any case were not addressed to the complainants and which they may not rely on - were about finances in the two member States and are irrelevant.

The complainants acted in breach of good faith by applying for leave to go to the Tribunal if their appeal failed and then demanding a substantiated decision.

The Council has no duty to state the reasons for general decisions.

The method used since 1979 to adjust pay and the prescribed procedure were followed in 1992 and 1993. In any event the index provided for in Regulation R IV 1.01 for the periodic salary review is not binding in law.

D. In their rejoinder the complainants ask what construction is to be put on Judgment 1329. In their view the ratio decidendi is at variance with Judgment 832 (in re Ayoub and others), in which the Tribunal held that the challenged decisions might not be taken out of context. Their financial position should therefore be looked at in the light of the cumulative injury they have sustained because of "the series of small changes" made by the Council. Although the Tribunal did not uphold that argument in Judgment 1329, what the complainants call the "trigger point" that Judgment 832 postulated was passed in 1993.

Although Judgment 1329 held that the Council's only obligation was to "determine pay scales from time to time", it failed to meet that obligation in 1992 and merely established an "overall staff budget index". So either the pay slips have no basis in law or else the Director-General determined the pay scales himself, though he is not empowered to do so.

The impugned decisions compound a run of measures which - whether or not they were lawful - have made their financial plight worse and so infringed their acquired rights. The injury is the greater because, contrary to what CERN alleges, the five-yearly review in 1990 did not come to an end with the Council's decision of 14 December 1990.

Citing a paper of 1979 reviewing pay at CERN, they reaffirm that the first factor of the method is binding.

Lastly, they say that they obtained lawfully the delegations' letters of 27 November 1992 and ask CERN for an "apology" on that score.

E. In its surrejoinder CERN contends first that, whatever the Tribunal may rule, the complainants will not get the increase in pay they want. So they show no cause of action.

Secondly, it submits that their pleas are identical to those that the Tribunal reviewed and dismissed in Judgment 1329 and are therefore unfounded.

Thirdly, and turning to the pleas in the rejoinders, it maintains that though the Council did not expressly say so in determining the staff budget index it thereby set the pay scales for 1993. When the Finance Committee approved the 1993 budget it pointed out that "in December 1992 the Council decided to grant a weighted average salary adjustment of 2.46 per cent". In any case, even if the Tribunal holds on that account that the Director-General's implementing decisions of January 1993 were unlawful, it may not set pay in the Council's stead.

The requirements of the case law on acquired rights are not met here. No provision has been amended to the complainants' detriment. Besides, provisions on variables like a pay index do not create acquired rights.

What was said in Judgment 1329 applies to the first and second factors alike, and the quibbling over the delegations' letters calls for no answer.

CONSIDERATIONS:

1. On 10 and 17 March 1993 the complainants lodged appeals with the Director-General of CERN. They were challenging the decision the Organization's Council had taken on 16 December 1992 to limit the increase in the staff budget for 1993 to 2.4 per cent and the individual decisions in their pay slips for January 1993, which show an increase of 2.46 per cent. The Director-General has given them leave to come straight to the Tribunal without prior referral of their claims to the Joint Advisory Appeals Board.

2. The three complaints are joined because they challenge the same decisions and rest on the same pleas.

Receivability

3. The Organization contends that the complaints are irreceivable on the grounds of the complainants' lack of locus standi, the nature of the decisions they are impugning and the thrust of their pleas.

4. The answers are in Judgment 1329 (in re Ball and Borghini) of 31 January 1994, which was about CERN staff pay for 1992 and by which the Tribunal abides save as to two issues that are peculiar to this case.

5. Over and above the objections to receivability that Judgment 1329 dismissed, the Organization argues in its surrejoinder that since all that the complainants claim is the quashing of the Director-General's decisions to reject their internal appeals they show no cause of action; even if the impugned decisions were set aside the Director-General need then merely review their internal appeals and the decisions applying the new salary scales to them would still stand.

6. Such narrow interpretation of their claims is unsound. To reject their internal appeals was to uphold the decisions they were appealing against. It is those decisions that are the nub of their complaints and that beyond question afford them a cause of action.

7. Besides the pleas put forward in the complaints that Judgment 1329 ruled on, the complainants have two more, and the first question is whether they are receivable. One of them is that a run of unlawful decisions has cumulatively harmed the financial interests of CERN staff to the point of infringing their acquired rights.

8. Judgment 1329 said in 9 that the lawfulness of the individual decisions in pay slips may be determined only by

reference to the Council's latest decision on pay scales and that appeal will not lie sine die against earlier decisions. Yet the plea of breach of acquired rights is receivable and in ruling on it the Tribunal may take into account any issues of fact it deems material. As it said in Judgment 986 (in re Ayoub No. 2 and others), "especially in times of change material evidence must include evidence on the general context in which the decision has been taken ... A run of small amendments may offend against the whole spirit of the rules". So an employee may properly plead a decline in his situation tantamount to impairment of the essential and fundamental terms of his employment, even if the decline has been gradual and due to an accumulation of decisions which are no longer open to challenge and none of which, taken singly, would have been declared unlawful.

9. Secondly, the complainants contend that the Council's decision of 18 December 1992 did not approve pay scales but merely set a percentage increase for expenditure on staff. CERN retorts that the complainants may not so plead because upholding their point of view would remove the basis in law for the payments of salary they have been made.

10. That is an issue that turns on the substance of their claims. Having as they do an indisputable interest in challenging the figure of pay, they may plead as they wish in challenging the decision that affords the basis for it in law.

11. The conclusion is that for the reasons given in Judgment 1329 under 6 the complainants may not directly seek the quashing of the Council's decision of 18 December 1992. They may, however, challenge the individual decisions in their pay slips for January 1993 by pleading the unlawfulness of the decision of 18 December 1992 - but not the ones on pay in earlier years - and the infringement of any acquired rights they lay claim to under rules or contract.

The merits

12. There is no need to take up all the complainants' pleas since they succeed in their contention that the Council's decision of 18 December 1992 afforded no proper basis for pay in 1993.

13. Rule IV 1.01 says that "the remuneration scales shall be determined and periodically reviewed by the Council", and Regulation R IV 1.01 that "when reviewing remuneration, the Council shall use as a guide an index, the composition and method of calculation of which it shall determine". A working party recommended in 1979 and CERN decided that there should be general review of pay scales every five years and yearly review

in between. The Director-General reports any resulting adjustments to the Finance Committee and to the Council in December and their decisions ordinarily take effect at the following 1 January. They take account of movements in an index that reflects the cost of living in Geneva and the pay of staff of the Geneva public utilities department or the Swiss Federal Civil Service. The index serves as a "guide" in taking decisions and, as Judgment 1329 said, creates no obligation in law.

14. In this instance the cost variation index was reckoned for 1993 and a detailed report on method and results was put to the Finance Committee and the Committee of the Council. But the focus of debate by the competent bodies was not the "guide" but the financial plight of CERN and its membership. The Council voted merely for increases of 2.4 per cent in the budget for staff and of 1.6 per cent in the budget for supplies. It thereby took decisions in discharge of its responsibility for the budget, but it omitted to review the "remuneration scales", and that is what Rule IV 1.01 requires. It is plain on the evidence that it was the Director-General who, in keeping with the Council's budgetary decisions, granted an increase in pay for all staff. The increase was 2.46 per cent. That that is much the same figure as the increase approved in the budget shows CERN to be wrong in its assertion that the Council's decision on the index applicable to the staff budget also determined the index applicable to staff pay. The Finance Committee did approve the budget for 1993 in March of that year on the strength of a 2.46 per cent "weighted average salary adjustment", and similar practices had gone unchallenged in the past. But that does not alter the fact that staff pay for January 1993 rested on a budgetary decision that failed to set the new pay scales.

15. So the complainants succeed in their claim to the quashing of the Director-General's decisions of 26 March 1993 upholding the ones in their pay slips for January 1993. The individual pay slips are set aside too.

16. Lastly, the complainants are entitled to a single award of costs, and the amount is set at 15,000 French francs.

DECISION:

For the above reasons,

1. The individual decisions in the complainants' pay slips for January 1993 and the Director-General's decisions of 26 March 1993 to uphold them are set aside.

2. The case is sent back to the Organization for the setting of the complainants' pay for January 1993 on the strength of lawfully determined scales.

3. CERN shall pay the complainants the single sum of 15,000 French francs in costs.

4. Their other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re DECARNIERE No. 2 and
VERLINDEN Nos. 1 and 2

Judgment 1369

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Josephus Verlinden against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 19 May 1993 and the second complaint filed by Mr. Jacques Decarnière against the same Organisation on 24 May, Eurocontrol's replies of 27 July and 3 August 1993, the complainants' rejoinders of 23 January 1994 and the Agency's surrejoinders of 29 April 1994;

Considering the second complaint filed by Mr. Verlinden against the same Organisation on 22 September 1993, Eurocontrol's reply of 10 January 1994, the complainant's rejoinder of 19 February and the Agency's surrejoinder of 6 May 1994;

Considering the applications to intervene received at the Registry of the Tribunal on 6 May 1994 from:

H.-J. Abramowski
W. Adamson
D. Aelvoet
J. Akkermans
G. Anastasiou
J. Andriese
R. Angermergd
I. Aras
P. Bals
B. Bams
E. Bartels-Lemmens
R. Bartlett
J. Bautista
H.-W. Becker
H. Bergevoet
J. Beyer
L. Bieshaar
N. Bisdorff
R. Blau
B. Bocquillon
G. Boel
B. Boerrigter
G. Boers
R. Boese
C. Boesmans
D. Boets-Defrance
P. Boland
H.-J. Bolz
C. Bonadio
H.-G. Bons
F. Bontems
J. Boots
A. Booy
A. Bos
J. Bouillier-Oudot
J. Bralet
F. Brams
C. Breeman
C. Breeschoten
K. Breivik

T. Brennan
G. Bricart
H. Buck
O. Byelmann
F. Caloo
R. Carmienke
F. Carrara
S. Carvalho
B. Cassaignau
M. Castenmiller
M. Chauvet
A. Claes
R. Claes
M. Coolen
J. Corbeel
E. Corsius
L. Corswarem-Stessens
A. Cuveliers
H. Dander
B. Darke
A. Davister
J. de Beurs
W. de Boer
A. de Vos
P. de Zeenn
J.-M. Debouny
P. Demelinne
J. Demesmaeker
J. Dieters
J. Dos Santos
J. Doyle
F. Dupont
M. Durasse
C. Edeb
P. Emering
A. Engel
R. Engels
H.-P. Englmeier
C. Enright
E. Essers
C. Esslemont-Richez
H. Evers
G. Fairfax Jones
M. Falk
F. Faria Da Silva
Y. Fauchot
R. Feyens
J. Fiers
R. Fisch
P. Fischbach
J.-L. Flament
P. Flick
J. Florax
J.-P. Florent
Y. François
J. Frusch
G. Gabas
C. Galeazzi
R. Geldhof
J. Gerards
J. Geurts
D. Glennon
H. Goldner
D. Grew
W. Gribnau
R. Grimmer
A. Gubbels
M.-T. Guerin
T. Guldemont
W. Haarmann
C. Habes
J. Haine
J. Haines
I. Hamers
J.-L. Hardy
G. Harel
H. Hauer
E. Hauff
U. Heger
J. Heller
F. Hendriksen
H.-J. Hermanns
L. Hertog
M. Hervot
R. Hess
H. Hille
S. Hitchcock
E. Hochstein
W. Holtmann
H.-D. Höyng
E. Huebsch
H. Huizer
P. Hunt
W. Jagemann
M. Jenz
P. Kaisin
M. Kalin
A. Kalkhoven
H. Kaltenhäuser
S. Kauppinen
B. Klarmann
G. Klein
J. Kloetstra
H. Klos
J. Koolen
H. Koot

W. Kramer
W. Kühn
H. Kunicke
L. Lang
P. Lascar
P. Leeuwenburgh
W. Leistico
W. Lembach
M. Lemmens
C. Lenfant
M. Lenglez
C. Licker
A. Lieuwen
H. Liss
W. Lockner
L. Löser
W. Lumpe
C. Lung
J.-P. Majerus
J. Martens
P. Matern
D. Mauge
H. Meertens
C. Meier
M. Melet Laine
M.-T. Meloni
V. Meyer
B. Michaux
R. Moers-Janssen
A. Molenaar
B. Molloy
R. Mühlstroh
P. My
C. Nelissen
M. Nicolay
M.-L. Nivelle
L. Olivier
G. Ostertag
R. Paulssen
P. Petitfils
V. Philippon
R. Pierrard
F. Plaza Bodalo
E. Poelmans
C. Pohl
C. Poinsot
C. Portzenem
V. Poty
J. Prevoo
M. Prosser
H. Purvis
H. Rakete
M. Ramus
M. Ravier
M.-L. Rensink-Leclercq
J.-J. Richer
J.-M. Rigolle
G. Riley
E. Rinkens-Knops
A. Ritchie
F. Robert
G. Romijn
J. Rose
Y. Rossel
J. Roulleaux
G. Roumajon
J.-P. Rue
T. Saglik
C. Sampson
S. Scharte
H. Scheffler
G. Scheltien
F. Schönenborn
J. Schraa
A. Schuh
K.-H. Seipke
K. Seybold
E. Sikkens
F. Skerhut
L. Smulders
E. Snijders
S. Starlander
F. Steijns
E. Steiner
W. Stijns
K. Stoltefuss
J. Storms
S. Stroobants
V. Stuhlsatz
C. Suttie
N. Szewczuk
J.-Y. Tfelt
A. Thill
R. Tielemans
H. Tielker
C. Tovy
R. Ueberhofen
J. Uhl
A. Urlings
I. Vallinga
E. van den Heuvel
A. van der Klij

P. van der Kraan
W. van der Molen
M. van der Sluis
M. van der Stockt
G. van Dijk
P. van Grieken
T. van Hal
F. van Landuyt
P. van Lent
M. van Loon
J. van Riemsdijk
J.-P. Vanderspikken
M. Vanhemelrijck
E. Vanhoven
B. Vaury
P. Vercruijsse
P. Vergauts
F. Vergne
F. Verheijden
M. Verschaffel
L. Verwilst
W. Viertelhauzen
C. Vodak
D. Volko
H. von Birgelen
E. Vreede
J.-P. Vriamont
F. Wagner
J. Watson
H. Weis
A. Werner
P. Wiegers
R. Wijnants-Moelmans
P. Wildey
J.-P. Willox
D. Wilson
D. Winkler
F. Wissink
W. Withofs
M. Woldring

and the defendant's comments of 28 June 1994 on those applications;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal, Articles 6.2(a) and 7(2) of the International Convention relating to Co-operation for the Safety of Air Navigation signed on 13 December 1960 (the Eurocontrol Convention) as amended, in particular with effect from 1 January 1986 by the Protocol of 12 February 1981, Article 12.1 of Annex 1 to that Convention and Articles 25, 65, 66 bis, 83 and 92 of the Staff Regulations governing officials of the Agency;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainants are officials of Eurocontrol. Mr. Decarnière works for its Institute in Luxembourg and Mr. Verlinden at headquarters in Brussels.

In a working paper, CE 92/169/11, of 29 January 1992, the Director General of Eurocontrol informed the Committee of Management of a set of proposals to adjust staff pay. Five of them reproduced measures that the Council of Ministers of the European Communities had adopted on 19 December 1991. They were: a new method of adjusting pay from 1 July 1991 to 30 June 2001; the correction of base salary as from 1 July

1990; the adjustment of pay and pensions as from 1 July 1991; a temporary contribution of 5.83 per cent of base salary from 1 January 1992 to 30 June 2001; and an increase from 8 to 8.25 per cent in the rate of pension contribution by staff.

There was a sixth proposal, for repealing as from 1 July 1991 a measure dating back to 7 July 1983 to "attenuate" increases in staff pay. The aim of that measure was to phase in a differential of 5 per cent in staff pay between Eurocontrol and the European Communities and by 1992 the differential stood at 1.53 per cent.

At its 169th Session, on 25 and 26 February 1992, the Committee approved the proposals and decided to submit them to the Permanent Commission of Eurocontrol by correspondence, as Rule 8 of the Commission's Rules allowed. The Commission learned of the proposals from a letter of 7 April 1992 signed by the Director General. To adopt the proposals the Commission had to be unanimous. Three States refused to approve the sixth proposal and asked to have the matter adjourned to the next session.

On the strength of an "Agreement on consultation, conciliation and arbitration" that Eurocontrol and the chairman of the staff unions had concluded on 9 January 1992, and which came into effect on 1 February 1992, the unions asked the Director General in a letter of 14 July 1992 to start consultations to get approval of the full set of proposals. Consultations ensued at a meeting on 23 July, at which the unions said that they would be starting the second stage of the procedure if no early solution was found. A joint communiqué went out announcing another meeting on 28 September 1992.

On 30 July the Director General sent a letter to the Committee of Management together with a motion by one of its members that for the time being it approve only the first five proposals. The Director General agreed with the motion and asked that it be conveyed to the Permanent Commission.

On 4 September the Commission approved the five measures. They were published in office notice 12/92 of 9 September 1992.

On 28 September 1992 there took place the scheduled meeting between Director General and unions but the consultation procedure was not begun.

The Permanent Commission eventually approved the sixth proposal at its 80th Session, on 1 December 1992.

As was said above, one of the five measures approved by the Permanent Commission on 4 September 1992 was the introduction of a temporary contribution at the rate of 5.83 per cent of base salary. As from October 1992 that contribution was shown in the staff's pay slips. On 18 December 1992 the complainants each lodged three "complaints" under Article 92(2) of the Staff Regulations against their pay slips for October, November and December 1992. In a minute of 19 February 1993 Eurocontrol rejected Mr. Verlinden's "complaints" about October and November. It did not answer the one about December. It disallowed Mr. Decarnière's three by a minute of 22 February 1993. Such are the decisions impugned in Mr. Decarnière's second complaint to the Tribunal and Mr. Verlinden's first.

By a letter of 30 March 1993 to the Director General Mr. Verlinden lodged another three internal "complaints" against his pay slips for January, February and March 1993. Besides the temporary contribution of 5.83 per cent he challenged the increase to 8.25 per cent in the pension contribution. The Director General rejected his "complaints" by a decision of 24 June 1993, and that is the decision he impugns in his second complaint.

B. The complainants contend first that the Organisation acted in breach of Article 65 of the Staff Regulations, which states that at the "instigation" of the Director General "the Committee of Management shall periodically examine the adjustments to salaries ... They shall be submitted to the Commission for approval ...". In the complainants' view the Director General had no authority to submit "to the Commission" in his letter of 30 July 1992 proposals that substantially changed those adopted by the Committee of Management at its 169th Session. By approving those changes, which are unlawful, the Commission acted ultra vires.

By writing to the Commission the Director General disregarded the consultation procedure provided for in the agreement of 9 January 1992 since he failed to inform the staff of the matter beforehand.

Article 65 lays down that salaries at Eurocontrol must take account of public sector salaries in member countries. That was why the pay scales were adjusted as from 1 July 1991. The effect of the Commission's decision of 4 September 1992 was to lower the complainants' pay by 5.83 per cent as from 1 October 1992. As the Appeals Committee of the Council of Europe held in a ruling of 15 May 1985, setting the scales of pay vests a "subjective" right in the complainants. So Eurocontrol infringed the complainants' acquired rights, particularly as the staff had disagreed with taking the measure on its own on the grounds that it was linked to the abolition of the 1.53 per cent differential in pay between Eurocontrol and the Communities.

The complainants' second plea is breach of Article 25 of the Staff Regulations: "any decision adversely affecting an official shall state the reasons on which it is based". The Organisation did not account properly, as the rules required, for the Commission's decision of 4 September 1992, or for office notice 12/92, or for the challenged pay slips.

In his second complaint Mr. Verlinden adds that the levy imposed by Article 66 bis of the Staff Regulations from 1 July 1981 to 30 June 1991 was a " single" and "exceptional" one. To his mind the Permanent Commission therefore had no right to introduce without the staff's consent a temporary contribution that extended the levy by ten years. The increase in pension contributions did not come after an actuarial assessment such as Article 83 of the Staff Regulations requires. It is arbitrary and unsubstantiated. It cannot be put down to alignment with practice in the Communities, since the situation of the two pension schemes is utterly different.

The complainants ask the Tribunal to quash the Agency's decisions of 19 and 22 February 1993 rejecting the "complaints" filed on 18 December 1992 against the pay slips of October and November 1992 insofar as they lower the complainants' salaries by 5.83 per cent in line with the Permanent Commission's decision of 4 September 1992; to order the Agency to pay the amounts unlawfully deducted from their salaries, plus interest on arrears at the rate of 10 per cent a year as from 18 December 1992; and to pay costs. Mr. Verlinden further seeks the quashing of the "implied decision of 18 April 1993" rejecting his "complaint" of 18 December 1992 challenging his pay slip for December 1992.

In his second complaint Mr. Verlinden seeks the quashing of Eurocontrol's three decisions of 24 June 1993 rejecting his "complaints" of 30 March 1993 against his pay slips for January, February and March 1993 insofar as they lower his pay by 5.83 per cent and deduct from it 8.25 per cent by way of pension contribution in line with the Permanent Commission's decision of 4 September 1992.

C. In its replies the Organisation submits first that the percentage increases in pay granted by the European Communities confer no right on its own staff, whose pay it adjusts quite independently.

Secondly, the Director General sent no letter to the Commission but on 30 July 1992 conveyed to the Committee of Management a motion by one of its members. The sixth proposal, which was to abolish the 1.53 per cent differential in pay between Eurocontrol and the Communities, went through the Commission on 1 December 1992. Although it did not take effect until 1 January 1994, that was offset by Eurocontrol's enforcing the temporary contribution only from 1 October 1992, whereas it had come in for staff of the Communities at 1 January 1992. The outcome was alignment with the Communities, but with some advantage to the complainants.

Thirdly, only on 1 February 1992 did the agreement between the Organisation and the chairman of the staff unions come into force whereas the proposals to amend the Staff Regulations had been sent to the Committee of Management on 29 January 1992. In any case the chairman did not agree in writing until 10 February 1992.

The Organisation submits that the Tribunal is not competent to enforce the agreement concluded with the unions on 9 January 1992. In its submission that text lays down no procedure prescribing agreement between the parties - decisions always being taken unilaterally by the competent authority - and is quite distinct from the Eurocontrol Convention and Staff Regulations. So the Tribunal may not determine whether it has been properly applied. Subsidiarily, the Organisation denies breach of the agreement.

On the merits it denies breach of Article 65 of the Staff Regulations. The allegations of fact that the complainants' pleas rest on are wrong. There was no bar to the Committee of Management's amending the proposals it had adopted in February 1992. Nor was the Commission required to adopt together all the measures approved by the Committee. The subject of Article 65 is adjustment of pay, not the temporary contribution, which came about for other reasons and is not determined according to the article. In any case the Commission eventually adopted without change every single proposal the Director General had put to the Committee on 29 January 1992. The complainants are mistaken in saying that Eurocontrol disregarded the need for parity in pay between its own staff and civil servants in member States. The Tribunal held in Judgment 1118 (in re Niesing No. 2 and others), and the Court of Justice of the European Communities in cases 81/72, 70/74 and 3/83, that Article 65 was not restrictive and that other factors might be taken into account in adjusting pay. The temporary contribution is covered by Article 66 bis, which is an exception to Article 65. There has been no breach of any acquired right since the temporary contribution was not made retroactive. Nor was the complainants' actual pay reduced, since the deduction from and increase in pay came together. The ruling by the Appeals Committee of the Council of Europe which the complainants cite is immaterial: it was about the retroactive effect of an amendment that required staff consent. Such consent is not required at Eurocontrol.

Secondly, in answer to the plea that it failed to account for the impugned measure the Organisation observes that the complainants are being inconsistent: they want alignment with the Communities, yet make out that an explanation that refers to such alignment will not do. The staff knew what was going on in the Communities: after all, they saw document CE 92/169/11 of 29 January 1992, the Committee of Management's minutes and its report to the Permanent Commission. The measures approved on 4 September 1992 were announced in office notice 12/92 of 9 September 1992, which gave explanations for each of them. And the decisions rejecting the complainants' internal "complaints" were substantiated in accordance with Article 92 of the Staff Regulations, the complainants being free to ask Personnel for any further explanation they might want. Besides, the impugned decisions met the staff's wishes by bringing about strict alignment with the Communities; so they did not call for any more ample explanation. The Commission is not required to substantiate decisions: Article 25 of the Staff Regulations, which says that reasons must be given when a decision affects an individual, does not apply to general measures, which the case law says may be explained in just a few sentences.

In its reply to Mr. Verlinden's second complaint the Agency states that the compulsory contribution is not an extension of the emergency levy, which came to an end on 30 June 1991. It is a new measure, the staff representatives agreed to it, and the rate may be adjusted in five years' time under paragraph 2(b) of Article 66 bis of the Staff Regulations. Eurocontrol has had no pension fund of its own since 1979, when Article 83 of the Staff Regulations was aligned with the corresponding article of the Communities' Staff Regulations. The actuarial assessment mentioned in Article 83 is just an option and not an obligation, and, as the Tribunal held in Judgment 429 (in re Gubin and Nemo), the Permanent Commission was free to adjust unanimously the rate of contribution in accordance with Articles 6.2(a) and 7.2 of the Convention as amended and Article 12.1 of Annex 1 thereto. The rate of pension contribution used to be higher than in the Communities but is no longer with the adoption of the impugned measures, which have brought about strict alignment.

The Organisation asks the Tribunal to declare that it is not competent to review the observance of the arrangements for consulting the staff unions; on the merits to set aside the complaints as unfounded; and to award "full costs" against the complainants.

D. In their rejoinders the complainants explain under the heading "Purpose of the suit" that they seek the quashing of the "decision of 29 May 1993" rejecting by implication the internal appeals filed on 30 March 1993 against the temporary contribution of 5.83 per cent and the deduction of 8.2[illegible] per cent by way of pension contributions from pay in January, February and March 1993.

They submit that the temporary contribution brought their pay from October to December 1992 below the figures for September 1992. Their basic pay for September should have been higher than the figures shown in their pay slips since pay had been adjusted as from 1 July 1990 and 1 July 1991. So they ask the Organisation to let them have detailed statements showing the arrears due.

Only after comprehensive negotiation with staff did the Communities bring in the emergency levy and the succeeding temporary contribution. There was no such negotiation at Eurocontrol since it did not tell its staff of the amended proposals the Committee of Management had adopted in August 1992. The Permanent Commission's approval of the sixth proposal does have a bearing on this dispute.

In the complainants' submission the Tribunal does have competence to say whether the agreement of 9 January 1992 was observed: patere legem quam ipse fecisti. Since the agreement covers any proposal to amend the Staff Regulations and the General Conditions of Employment of the staff of Eurocontrol's centre at Maastricht, the Tribunal is free to determine whether the agreement has been applied. If it were not, Eurocontrol staff would forfeit a right laid down by the European Convention on Human Rights, particularly since they may not as individual officials apply for observance of the conciliation and arbitration procedures the agreement prescribes.

The complainants develop their pleas on the merits. They contend that since the representatives of member States were not told of the staff's views beforehand their decision is unlawful. The Organisation was wrong to use the Communities' statistics to gauge variations in civil servants' pay in its twelve member countries, which are not the same as the countries referred to in Article 65 of the Staff Regulations. Decision 3/83 of the Court of Justice of the European Communities is immaterial: the levy challenged in that case was introduced with the agreement of "the most representative staff organisations". The levy at Eurocontrol was not. The ratio of the ruling made by the Appeals Committee of the Council of Europe on 15 May 1985 is relevant. Eurocontrol did fail to substantiate the impugned decisions properly.

E. In its surrejoinders the Organisation points out that in their rejoinders the complainants have much altered the thrust of their case: their claim to the quashing of the "decision of 29 May" and their objection to the increase in the pension contribution, both of which they are making for the first time, are out of time and therefore irreceivable.

It abides by its view that the Tribunal may not entertain complaints about infringements of the agreement concluded with the unions in January 1992. The case law delimits the force of collective agreements, for example Judgment 236 (in re Belchamber) by the United Nations Administrative Tribunal: such agreement is not part of a staff member's contract of employment. The agreement itself refers dispute for conciliation and arbitration, which the unions failed to instigate in this instance.

The Organisation presses its pleas on the merits.

It denies breach of the agreement of January 1992 and failure to keep the unions abreast of the measures, which they expressed agreement with anyway.

As to the alleged breach of parity with national civil servants' pay, it points out that the authentic version of Article 65 refers to "pays de service", not to member countries, and that Eurocontrol provides no service outside the Communities. A subjective right does not arise until approved by the competent authorities, and Eurocontrol did not infringe the complainants' rights: the temporary contribution has not had the effect of reducing their pay.

The Organisation did substantiate the impugned decisions adequately.

In its surrejoinder on Mr. Verlinden's second complaint Eurocontrol presses its pleas and argues that he must have known that the change in the rate of pension contribution was one of a set of measures that were adopted unanimously. The rate at Eurocontrol was last put up in 1977. The latest increase has not radically changed the terms of the complainant's employment and he has no acquired right to the rate's remaining constant throughout his stint at Eurocontrol.

CONSIDERATIONS:

1. The complainants, who are on the staff of Eurocontrol, object to the Organisation's reckoning of their pay on the realignment of salaries as from 1 October 1992. The complaints being identical save as to the periods which they relate to and which are from October 1992 to March 1993, the Tribunal joins them so as to give a single ruling.

The background to the case and its purpose

2. On 9 January 1992 Eurocontrol, as represented by its Director General concluded with its staff unions a collective agreement headed "Agreement on consultation, conciliation and arbitration procedures". It is a basic agreement which, subject to the authority vested in the Staff Committee under the Staff Regulations, lays down a procedure for "consultation" and two disputes procedures, "conciliation" and "arbitration". A schedule sets out criteria for determining whether staff unions are representative, grants them access to the Agency's working papers and describes the sundry facilities the Agency is to allow them.

3. According to a working paper - CE 92/169/11 - which the Director General put to the Committee of Management on 29 January 1992 the Agency was then about to adjust pay to bring it back into line with the European Communities. There had been disparity since 1987, when the Agency brought in the so-called "Eurocontrol reduction" of 5 per cent. Actually the "reduction" never went beyond 1.53 per cent. Judgment 1118 (in re Niesing No. 2 and others) of 3 July 1991 gives an account of it.

4. On 14 July 1992 the staff unions asked the Director General to start "consultation" on those matters under the agreement of 9 January 1992. The upshot was concurrence in a "pay package" consisting in endorsement of the following action on pay that the Council of the Communities had already taken:

> a new method of adjusting pay in the period from 1 July 1991 to 30 June 2001;
>
> the introduction of a "temporary contribution" at the rate of 5.83 per cent of base salary from 1 January 1992 to 30 June 2001, to replace the "emergency levy" brought in at the rate of 12.7 per cent in 1981 but lowered to 7.62 per cent by the time of expiry at 1 July 1991;

an increase from 8 to 8.25 per cent in the rate of pension contributions by staff;

the correction of base salary as from 1 July 1990; and

the adjustment of pay and pensions as from 1 July 1991.

5. The staff representatives agreed to those five measures, but there was a sixth, for repeal of the Eurocontrol "differential" of 1.53 per cent. On that score the appendix to CE 92/169/11 said under 5:

> "At its session on 3 July 1991, the [Tribunal] acknowledged the validity of the differential applied, after having ruled against its retroactive application at an earlier session.
>
> There is a need to consider the stance to be adopted as to the maintenance or abolition of this differential.
>
> The Director General's recommendation with regard to the abolition of the 5% differential (also recommended in the Administrative and Technical Inspection Committee's Report in 1989) was endorsed by the Committee of Management at its 164th Session in May 1990.
>
> All the arguments put forward at that time in favour of abolition are still pertinent and topical. They relate, inter alia, to the substantial change which has taken place in Eurocontrol's tasks since 1983, when the original decision had been taken, and also to the poor staff/management relations caused by this measure, the negative impact of which far outweighs the economy secured.
>
> In view of the above considerations, it would seem appropriate to abolish this 5% differential with effect from 1.7.91."

6. The Committee of Management approved those measures and passed them on to the Permanent Commission. The Commission adopted the first five but one delegation asked that the sixth be held over to the next session. In office notice 12/92 of 9 September 1992 the Agency announced the five approved, and they were first reflected in staff pay in October 1992. From then on pay was subject both to the differential and to the temporary contribution of 5.83 per cent.

7. All this prompted further consultation with the unions on 28 September 1992. A joint communiqué then went out saying that the staff representatives regretted the Commission's failure to accept the whole pay package and demanded full alignment of pay at Eurocontrol and the Communities, which

meant doing away with the differential altogether. Both sides promised to keep in touch pending the meeting the Commission was to hold in December.

8. On 1 December 1992 the Commission eventually approved the sixth measure - dropping the differential - but only as from 1 January 1994, or fifteen months after the other measures for alignment with the Communities had come in.

9. On 18 December 1992 Mr. Decarnière filed an internal "complaint" in standard form under Article 92(2) of the Staff Regulations against the reckoning of his pay for October, November and December 1992. He said that the figures had been unlawfully docked by the imposed combination of two levies, the 5.83 per cent "temporary contribution" and the 1.53 per cent "reduction", neither of which had followed negotiation with staff representatives or came with a word of explanation. Mr. Verlinden lodged identical "complaints" on the same day as Mr. Decarnière about pay for the same three months and another on 30 March 1993 about his pay for January, February and March 1993.

10. The Director of Personnel rejected those internal appeals on the Director General's behalf in letters of 19 and 22 February and 24 June 1993. He reminded the complainants that at its session of 25 and 26 February 1992 the Committee of Management had endorsed the Director General's proposal to adopt all the measures in CE 92/169/11, including the dropping of the differential, but that the Permanent Commission had been split on the differential because in Judgment 1118 the Tribunal had upheld it as lawful; so not until 1 December 1992 had the Commission decided, in a spirit of social partnership, to do away with the differential as from 1 January 1994.

11. Two conclusions may be drawn. First, the real matter at issue is the repeal of the 1.53 per cent differential, a measure which the unions made a condition of their consent to the pay scales obtaining in the Communities and which carried the burdens of the new temporary contribution and the higher rate of staff pension contributions. The second conclusion is that the dispute is over a transitional issue because it covers the period from 1 October 1992, when Eurocontrol went back to the pay scales approved by the Council of the Communities, until 1 January 1994, when the Commission's decision of 1 December 1992 to do away with the differential came into effect.

12. The complainants enlarge on the two main pleas they put forward in support of their internal appeals:

(a) breach of Article 65 of the Staff Regulations on adjusting pay:

in the Director General's failure to exercise his right to "instigate" proposals to the Committee of Management and the Permanent Commission;

in disregard of the outcome of the consultations with the unions under the agreement of 9 January 1992;

in breach of "parity" between Eurocontrol and the Communities; and

in breach of the staff's acquired rights on expiry of the emergency levy.

(b) breach of Article 25(2) of the Staff Regulations in Eurocontrol's utter failure to explain the decisions taken.

The Tribunal's competence as to collective agreements

13. Though it answers each argument in detail, Eurocontrol begins by challenging the Tribunal's competence to review observance of the agreement of 9 January 1992. In its submission the purpose of the agreement is to offer procedures outside the pale of the Staff Regulations for avoiding collective labour disputes. It points out that there is nothing in the Regulations about procedures that come under labour law, not administrative law. So objections to the observance of the agreement go beyond the sphere of the Tribunal's competence as delimited in Article II of its Statute and accepted by the Organisation. Eurocontrol submits that the Tribunal's competence is confined to the individual contract of employment. So the collective procedures in the agreement of 9 January 1992 cannot supplant each staff member's defence of his own individual rights; indeed the staff member may challenge even a decision that union representatives have agreed to if he thinks it does him injury.

14. The Tribunal will take up the preliminary demurrer, which raises weighty issues, before going into the merits. The gist of it is that the Tribunal may not rule on the legal effects of the agreement of 9 January 1992 and in particular that the complainants may not plead breach of that agreement in challenging the lawfulness of the pay adjustments decided on 4 September 1992.

15. The Tribunal must enforce the law within the full ambit of the competence its Statute vests in it. For that purpose it will apply any material rule of law, be it international or administrative or labour law or any other body of law. The only sort it will not apply is national law,

save where there is express renvoi thereto in staff regulations or contract of employment: see Judgment 1311 (in re Guerra Ardiles) under 15. So Eurocontrol is wrong if it is seeking to keep the Tribunal within the bounds of administrative law to the exclusion of such sources as labour law.

16. What the preliminary objection comes down to is whether a complainant may rely on a collective agreement like the one of 9 January 1992 in pleading his case before the Tribunal. It is a truth universally acknowledged that the collective agreement is a basic vehicle of social progress, justice and peace. That that is so is due to the International Labour Organization, among others, and to its international instruments such as the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and the Labour Relations (Public Service) Convention, 1978 (No. 151). An international organisation is still of course free to choose whatever methods or means it likes - be they formal rules or contracts of employment - to define the terms of appointment of staff. But any collective agreement it does conclude becomes part of the law of the international civil service. Signing such an agreement puts it under obligations in law; a member of its staff may plead such obligations in a complaint to the Tribunal; and the Tribunal will review compliance with the letter and spirit of the agreement.

17. It is in the light of such precepts that the Tribunal rules below on the case of Eurocontrol. After years of conflict with the staff and a spate of litigation uncertain in outcome and - as the Director General properly observed - adverse in effect, Eurocontrol came round to a cooperative approach by concluding the agreement of 9 January 1992. By virtue of its contractual nature it is a source of law which in the interests of both sides the Tribunal regards as material.

18. Eurocontrol is right in pleading that the collective procedure set up under the agreement cannot supersede each staff member's defence of his own rights. A collective agreement, even though concluded with staff associations acknowledged to be representative, does not divest the staff member of the safeguards he enjoys under the Staff Regulations. By the same token there is nothing to keep him from relying on a collective agreement even if, not being a member of a staff association, he is not himself privy to it. Such indeed are consequences that flow from freedom of association and the principle of equal treatment.

19. Eurocontrol's preliminary objection therefore fails. There being no need to rule on the objections to receivability that it raises in its surrejoinder, the Tribunal will now rule on the merits, with due regard to the relevant clauses of the agreement, on which it has entered full, albeit subsidiary, argument.

The alleged breach of Article 65 of the Staff Regulations, the agreement on consultation and "parity"

20. The complainants put forward a set of connected pleas on the procedure for adjusting pay, a matter governed by Article 65 of the Staff Regulations. The article reads:

> "On the instigation of the Director General, the Committee of Management shall periodically examine the adjustments to salaries and allowances which it deems necessary. It shall take particular account of any variations in public service salaries in the different member countries and of the recruitment needs of the Agency.
>
> These adjustments shall be made by modifying the basic salaries as defined in Annex III or elements of the salaries and allowances as defined in Article 62.
>
> They shall be submitted to the Commission for approval in accordance with the provisions of Article 14, paragraph 2, of the Statute of the Agency."

21. The complainants' first plea is that the Permanent Commission's striking out an essential item of the pay package infringed the Director General's right to "instigate" proposals and the Committee of Management's prerogatives.

22. In keeping with what was stated in a case against another organisation with similar rules (Judgment 1196, in re Andrews and others, under 11 and 12), the Director General's right to propose is an important safeguard of the stability of the staff's rights in that a body like the Permanent Commission of Eurocontrol may not act on its own motion unless the Director General has submitted a proposal to it and unless it had advice from the Committee of Management, a body that is responsible for reviewing the adjustment of pay from time to time. But once the Permanent Commission properly has before it a proposal submitted by the Director General to the Committee of Management the Commission has unfettered freedom as the governing body of the Agency to decide on that proposal. So in this case it acted properly in adjourning debate on one item of the package.

23. The complainants' second plea rests on a similar point, which is breach of obligations they see as arising under the agreement of 9 January 1992. They say that the Director General ought not to have yielded so readily on the sixth measure - the repeal of the differential - when he knew it was the *sine qua non* of the staff's accepting the burdens of the temporary contribution of 5.83 per cent and the rise in the rate of pension contribution from 8 to 8.25 per cent.

24. In line with the agreement the consultations on the pay package set a goal which the Director General approved and the Committee of Management endorsed. But since it was then too early to be sure that the competent body - the Permanent Commission - would agree, the consultations could not yet be deemed to lay any legal obligation on the Organisation. Their only effect was to commit the Director General to working in good faith towards the goal he had set in agreement with the staff representatives. The joint communiqué issued on 28 September 1992 after the second round of consultations shows that was how the staff unions too saw things.

25. By dint of the Director General's efforts the goal was eventually attained on 1 December 1992. It may be a pity that when taking the decision to adjust pay the Permanent Commission did not acknowledge the part the staff had played by taking on the burdens that the adjustment required. Yet the fact is that Eurocontrol was not in breach of any commitment it had made towards the staff unions, whether under a formal agreement reached in the consultations or at the later stages of "conciliation" and "arbitration".

26. Last comes what the complainants call the rule of "parity" in pay between Eurocontrol and the Communities. The Organisation has consistently maintained that its following the Communities does not impair its administrative autonomy or its right to set pay according to its own needs. So, although it eventually put an end to discrepancies that had proved rather awkward than helpful, that does not at all mean that alignment with pay in the Communities must be immediate and complete.

27. The conclusion is that none of the arguments under this head is sound in law.

The alleged failure to explain the decisions properly

28. The duty to explain a decision is a general principle of administrative law: the decision-maker must at least give such statement of the reasons for the decision that anyone it affects may defend his rights and the Tribunal may rule on any case before it. But the content of the duty will vary with the nature of the decision.

29. The decisions impugned in this case are peculiar in two respects: they came after collective consultations; and the purpose of the consultations was to secure endorsement of decisions on pay that were the outcome of a process in another organisation, the Communities. There are other examples of such process in the law of the international civil service; indeed it has taken the form of an institution in the "common

system" of the United Nations. Those two features of the case are material to the content of Eurocontrol's duty to account for its decisions.

30. The consultations with the unions under the agreement of 9 January 1992 distinguish this case from the earlier ones about the Eurocontrol "reduction". In those cases the Organisation kept the staff from knowing the real reasons for a decision which it imposed on them unilaterally. Ever since the signing of the agreement on 9 January 1992, and in this particular instance, the staff have had access through their representatives to the relevant information and have been able to look at proposals in close cooperation with management and in keeping with the procedure for consultation. The Organisation was therefore not required to state again reasons which it had already revealed in the consultations. There is no omission in that respect that the complainants may rely on. So much is plain from office notice 12/92 of 9 September 1992, which is part of the case records and affords all the material information.

31. Again, the duty to explain a decision differs in content when an organisation takes over as a whole the decisions on pay that another one - in this instance the Communities - has already adopted. One point worth noting is that in the Communities the process for taking decisions on pay is governed by a set of rules that are strictly complied with: consultation with the staff (see for example the ruling of 5 June 1973 by the Court of Justice of the Communities on Commission v. Council of the Communities, ECR 1973, p. 575); the duty to substantiate, laid down in general terms in Article 190 of the Treaty establishing the Communities; and the staff appeal procedure. So on falling into line with the Communities Eurocontrol had no further obligation to give an explanation especially since it was the staff themselves who had been demanding alignment.

32. In sum the plea that the decisions were not substantiated must fail.

33. Since the complaints fail, so too do the applications to intervene, there being no need to determine whether they are receivable.

34. Although the complaints are dismissed the Tribunal will not allow the defendant's claim to the award of "full costs" against the complainants.

DECISION:

For the above reasons,

The complaints, the applications to intervene and Eurocontrol's claim about costs are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re SIGRIST | Judgment 1370

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Aloïs Joseph Sigrist against the International Telecommunication Union (ITU) on 30 June 1993 and corrected on 16 September, the ITU's reply of 3 December 1993, the complainant's rejoinder of 4 March 1994 and the Union's surrejoinder of 8 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 3.8 and Rules 3.4.2 and 11.1.1.2 and .4 of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss citizen who was born in 1939, joined the General Service category of the ITU's staff in Geneva in 1970 at grade G.6. In 1971 he was promoted to grade G.7.

By a letter of 9 September 1977 the Secretary-General told him that his post had been classified in a grade in the Professional category, P.2, and that the Appointment and Promotion Board took the view that he "met the requirements for promotion to the grade" of the post as from 1 January 1977; if he wanted to keep his pensionable remuneration at the level corresponding to grade G.7 he might apply for payment of special post allowance as from 1 January 1977; and he would have to return the sums he had been paid in compensation for overtime hours worked in the General Service category unless he consented to the postponement to 1 April 1977 of his promotion or to payment of a special post allowance. By a letter of 21 September 1977 he agreed to be paid the special post allowance as from 1 April 1977.

By a memorandum of 22 August 1991 he applied to the Secretary-General under Rule 11.1.1.2 a) to have the amount of his post allowance adjusted retroactively to make up for the loss in pay which he said he had sustained from adoption of the new salary scale, published on 13 May 1991, for General Service staff at Geneva.

Having had no reply within the time limit in Rule 11.1.1.2 b), he lodged an appeal with the Appeal Board on 14 November 1991 against the implied rejection of his claim. The Board reported to the Secretary-General on 18 March 1993. Having failed to agree, its three members each wrote separate opinions. Two of them were of the view that, though anomaly there was, the Union had not treated the complainant unlawfully; the third member, who was the staff representative, dissented.

On the strength of the Board's report the Secretary-General told the complainant in a letter of 1 April 1993 that he was "free to apply for the cancellation of [his] special post allowance at grade P.2". The implied decision in that letter to reject his claim is the one he is impugning.

The Deputy Secretary-General had informed the complainant in a letter of 10 March 1993 that his P.2 post had been regraded P.3 and he was deemed to qualify for promotion to that grade. After correspondence he wrote to the Secretary-General on 27 May 1993 asking for the cancellation of his special post allowance and accepting the promotion to P.3. By a decision of 3 June the Secretary-General promoted him to P.3 as from 1 June 1993.

B. The complainant submits that the change in his category and grade in 1977 must be seen as promotion. Obviously at the time he did not qualify under Regulation 3.8 for special post allowance. The sole purpose of granting him the allowance was to let him have a P.2 salary - which at the time was higher than his salary at his step in grade 7 - yet keep his pensionable remuneration at grade 7, which was higher than the pensionable remuneration corresponding to his step in grade P.2. So for several reasons the decision he challenges is unlawful.

First, the Union was in breach of the principle - reflected in Rule 3.4.2 - that promotion means a rise in salary or at the very least protection from a drop in salary. To be sure, document CA 43/6729-E, which the Secretary-General put to the Administrative Council of the Union at its 43rd Session in 1988, shows that on promotion from the General Service to the Professional category the Union makes any resulting difference in salary equivalent to at least one step in the new grade for the year following the promotion. But the Union affords no guarantee of the level of pay thereafter.

Any practice whereby promotion may entail a fall in pay after the first year is inadmissible. Indeed the Tribunal has condemned it in several rulings.

Secondly, even if the Union refuses to treat the complainant's change in grade in 1977 as promotion, any allowance - and of course especially the special post allowance, intended as it is to compensate for assumption of the duties and responsibilities of a higher grade - is just an incidental item of full pay on top of base salary. It may not become a sum to be subtracted from salary. So it is only logical and fair to allow the complainant at the very least G.7 pay if higher than what he was actually being paid. So the impugned decision disregards the rule that special post allowance may not be negative.

Thirdly, the Union's treatment of the complainant was not beyond reproach: over a year and a half went by - from 22 August 1991 to 1 April 1993 - between the complainant's application to the Secretary-General for review and the final decision. To lay the whole blame on the Appeal Board will not do: it is up to the Union to see that the time limits in the Staff Regulations and Staff Rules are observed. It was therefore in breach of good faith.

Lastly, the complainant pleads serious moral injury from the Union's blatant dilatoriness.

He asks the Tribunal to set aside the Secretary-General's decision of 1 April 1993 and accordingly order the Union to pay him for the period from 1 August 1990 to 31 May 1993 the difference between the pay he would have got had he kept grade G.7 and the pay he actually received, including the special post allowance, at step 14 in grade P.2, and to award him moral damages and costs.

C. The Union replies that contrary to what the complainant makes out he did not get promotion in 1977. Even though the Secretary-General spoke of "promotion" in his letter of 9 September 1977, he offered instead payment of the post allowance at grade P.2, and that is what the complainant accepted.

So though the Union could have adhered strictly to Rule 3.4.2.3 b) it went far beyond what that rule required of it and granted him instead something to his advantage.

It did not disregard the rule that promotion means a rise in salary or at least protection from a fall. Its position is set out in CA 43/6729-E and fully squares with Rule 3.4.2, which guarantees payment of a higher salary after promotion than before it, albeit for not more than one year. That is quite in line with the case law, which, though it accepts that because there may be career benefits promotion need not bring higher pay, does not require any indefinite guarantee of it.

True, special post allowance must not be negative; but adjustment in the post allowance, which the complainant is claiming, is not the only remedy for the decline in the terms of employment of Professional category staff. There were other options the Union would have agreed to had the complainant asked at the right time: he could have applied for the cancellation of the post allowance and kept only grade G.7 - which he had in fact never lost - or also sought actual promotion to P.2.

At some points in the internal proceedings the Administration was not as expeditious as it ought to have been. But its attitude towards the complainant was not dilatory and it was not in breach of good faith. So it caused him no moral injury.

D. In his rejoinder the complainant maintains that the change in grade in 1977 did amount to promotion.

In his submission the Union preferred the grant of special post allowance, which he sees as a means of giving effect to - the decision to promote him, to applying Rule 3.4.2.3 b). The reason was that though the rule affords guidance applying it would have meant blocking his pensionable remuneration for a long time, whereas letting him have the special post allowance had the effect of indexing his pensionable remuneration to the General Service salary scale. In any event grant of the special post allowance was no favour but just a way of fulfilling the obligation that every organisation has to protect the employee from the adverse consequences of promotion. Besides, the ITU made sure it complied with that obligation to the advantage of two other staff members in like case.

He rejects its reading of Rule 3.4.2 and of the case law and maintains that it is quite wrong to let promotion mean any loss of earnings after one year.

He denies that it was up to him to take action when the total of his P.2 salary and post allowance fell below the amount he would have been earning had he not been promoted. And he doubts that the Administration would have complied with a request for either of the options it suggests in its reply.

Lastly, he again alleges that the ITU's tardiness in dealing with his case caused him moral injury and citing Judgment 1326 (in re Gautrey), observes that it is not the first time that the Union has behaved in this way.

E. In its surrejoinder the Union maintains that what the complainant got in 1977 was not promotion but special post allowance, which it says was the best solution for him.

The two other cases he cites are immaterial: one official's position was not the same as his in law; in the other case the action taken was exceptional and ex gratia.

The Union maintains its interpretation of Rule 3.4.2 which, it observes, the Tribunal has confirmed again recently in Judgment 1322 (in re Anderson).

Lastly, it again asserts its good faith towards the complainant and in support of its case cites the Tribunal's ruling in Judgment 1326.

CONSIDERATIONS:

1. The ITU appointed the complainant in 1970 at grade G.6 and promoted him to G.7 in 1971. His unit, the secretariat of the International Frequency Registration Board, having been reformed, the Secretary-General of the Union told him in a letter of 9 September 1977 that his post had been upgraded to P.2 and that in the Appointment and Promotion Board's view he qualified for promotion to that grade as from 1 January 1977; but so as to keep his pensionable remuneration at the G.7 level he might opt for payment of special post allowance as from the same date. He concurred with the suggestion and so got the special post allowance as from 1 April 1977.

2. On 22 August 1991 he asked the Secretary-General to recalculate his post allowance to make up for the loss of pay he had suffered since January 1991, when the Union had brought in new scales of pay for staff in the General Service category. Having got no answer he inferred rejection of his claim and appealed to the Appeal Board on 14 November 1991. In its reply of 6 July 1992 to his appeal the Union confirmed the implied rejection. In the light of the Board's report of 18 March 1993 the Secretary-General decided on 1 April that (1) he was free to apply for the cancellation of the P.2 special post allowance and (2) if he agreed to promotion to P.3 and made a prior application for cancellation of the post allowance his pay would be reckoned on the strength of his personal grade, which was G.7. After getting further information about the promotion from the Secretary-General he applied on 27 May 1993 for cancellation of the P.2 allowance and accepted promotion to P.3. By a decision of 3 June 1993 the Secretary-General accordingly promoted him to P.3.

3. The decision he impugns is the Secretary-General's decision of 1 April 1993 rejecting by implication his claim to review of the post allowance.

The decision taken in 1977

4. The complainant submits that the impugned decision offends against the provisions on promotion in the Staff Regulations and Staff Rules and the general rule that a promotion should bring more, or at least no less, pay than before. In his submission the decision of 9 September 1977 was to promote him, not just to grant him special post allowance, because the conditions in Regulation 3.8 for grant of the allowance were not met and the Union granted it only as a means of giving effect to his promotion.

5. The Union demurs. By its way of thinking the letter of 9 September 1977 is not to be treated as promotion, and it quotes the following excerpt:

> "... your post is graded P.2. The Appointment and Promotion Board ... took the view that you qualified for promotion to that grade as from 1 January 1977. But to keep your pensionable remuneration at the level of grade G.7 you may apply for special post allowance, which you would also get as from 1 January 1977."

6. It is hard to discern in that passage anything but the offer of a choice between promotion and a special post allowance. And the complainant opted for the allowance. That is borne out by his failing to cite any other formal decision to promote him to P.2, although there was such a decision when he got promotion to P.3. By a letter of 10 March 1993 the Deputy Secretary-General told him that his post had been upgraded from P.2 to P.3 as from 1 November 1992 and that he qualified for promotion to the higher grade. But - the letter went on - because of the possible disadvantages of promotion to P.3 in the circumstances then obtaining in the common system of the United Nations he was free to turn down the offer. His pay would be based on his personal grade, which was still G.7, provided he expressly surrendered the post allowance. The complainant accepted the offer and the Secretary-General promoted him to P.3 by the decision of 3 June 1993 mentioned in 2 above. So his administrative status just before promotion to P.3 was what it had been in 1977: his post was upgraded, he qualified for promotion to the new grade and his personal grade, G.7, served as the basis for reckoning his new pay. The only difference was that in 1993 he had to give up the post allowance whereas in 1977 he had to opt for it. The letter of 10 March 1993 makes it plain, and he does not deny, that his

promotion depended on his relinquishing the post allowance, promotion and grant of the allowance being mutually exclusive.

7. The Tribunal has already so ruled in Judgment 1171 (in re Saunders No. 6) in which it held under 2:

> "The fact that the complainant continued to receive the P.2 allowance shows that he was merely to discharge the duties of the P.2 post and was not promoted to P.2."

8. That answers the complainant's contention that he had been promoted to P.2 even though he was drawing the post allowance. It is immaterial whether or not the conditions in which he was granted the allowance met the requirements of Regulation 3.8: suffice it to observe that he acquiesced and amply reaped the benefit for most of the period during which he received the allowance. So the Tribunal cannot allow his plea that he was promoted.

9. For the foregoing reasons the complainant is mistaken both in fact and in law in pleading that the Union is in breach of the whole concept of "promotion". He was never promoted to grade P.2 but merely opted for a P.2 post allowance while keeping his own grade, G.7.

The allegedly "negative" post allowance

10. From January 1991 the complainant's pay at P.2 fell below what he would have earned, all told, if he had stayed at grade G.7 without the post allowance. He says that the post allowance has become "negative" and he has suffered a big drop in pay.

11. The Union observes that the allowance served him well for fourteen years, up to February 1991, and that only for a short while, in 1991 and 1992, did he actually lose. Though the parties disagree on how much he lost, they agree that loss there was. The ITU argues that the complainant fares as he does because of trends in pay for staff in the General Service category and that other ITU staff and officials of other organisations in the common system of the United Nations have fared likewise on account of the whittling down of pay of staff in the Professional category.

12. Those submissions satisfy the Tribunal that the fall in the complainant's earnings is due to factors which are beyond the Union's control inasmuch as they derive from the common system. The ITU was under no duty to reverse a decision which the complainant had consented to and which, until 1991 at any rate, was to his financial advantage. What is more, cancelling his post allowance would have meant promoting him to

the higher grade and, as the Deputy Secretary-General pointed out in his letter of 10 March 1993, that might be to his detriment because of prevailing conditions in the common system. The plea is devoid of merit.

The plea of bad faith

13. Lastly, the complainant contends that the Union's dawdling over his case shows bad faith. Over a year-and-a-half went by from his applying for review until his getting the Secretary-General's final decision, including just over sixteen months from 14 November 1991, when he went to the Appeal Board, until 18 March 1993, when it reported. Yet according to Rule 11.1.1.4 f) it should not have taken longer than fourteen weeks. The Union did not even bother to answer the request he made on 22 August 1991 for review and did not react until 6 July 1992, when it entered its reply to his appeal, nearly eight months after he had filed it.

14. Judgment 1317 (in re Amira) of 31 January 1994 brought out the need for a properly functioning internal appeal procedure, of which the Appeal Board is an essential part. In this case the Board took far too long to report and failed to perform its function properly. Although in the circumstances the shortcomings of the appeal procedure may not be deemed to constitute bad faith, the ITU was negligent and caused the complainant injury. On that account it must afford him redress.

DECISION:

For the above reasons,

1. The complaint is dismissed insofar as it seeks the quashing of the Secretary-General's decision of 1 April 1993.

2. The Union shall pay the complainant 5,000 Swiss francs in damages for the injury set out in 14 above.

3. It shall pay him 8,000 French francs towards costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda E. Razafindralambo P. Pescatore

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re ORTIZ Judgment 1371

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jorge Ortiz against the Pan American Health Organization (PAHO) on 21 July 1993 and corrected on 1 September, the PAHO's reply of 29 December 1993, the complainant's rejoinder of 28 February 1994 and the Organization's surrejoinder of 27 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and PAHO Staff Rules 530.3, 1040, 1050 and Manual paragraphs II.5.50 and II.9.250 to 375;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Costa Rican born in 1935, joined the staff of the PAHO in 1968. He is a chemical and industrial engineer by training and was employed as a scientist at grade P.4 in the Department of Research Coordination (DRC). His last fixed-term appointment expired on 31 December 1991.

In the report appraising his performance in 1976-77 - and in several later ones - his supervisor stated that the description of his post "needs revision". In the reports for 1987-88, 1988-89 and 1989-90 the rating of his "overall performance" was "unsatisfactory". On 2 January 1991 his supervisor said in the report for 1988-89 that the area of his specialisation and his post description did not match the "current structure and functions" of the DRC. The supervisor made similar comments, also on 2 January 1991, in the report for 1989-90.

On 1 May 1991 the complainant filed an appeal against the report for 1988-89; on 14 June he lodged a further appeal against the one for 1989-90.

In a letter of 26 August 1991 the Chief of Personnel told him that his post would be abolished under Staff Rule 1050 on 31 December 1991, said that there would be a reduction-in-force procedure and gave him notice of termination under 1040 on 31 December. Rule 1040 reads as follows:

> "... a staff member serving under a fixed-term appointment of one year or more, whom it has been decided not to reappoint, shall be notified thereof not later than three months before the date of expiry of the contract ..."

and Rule 1050.2:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director ..."

The complainant appealed against termination on 10 September 1991.

A reduction-in-force committee met from 18 September to 2 October and reported to the Director on 8 October: it had not found another post for him in the same occupational group at the same grade or even at one grade lower than the one he held.

By a letter of 28 October the Chief of Personnel sent him the committee's report and confirmed his separation from service on 31 December 1991.

In a memorandum of 26 November 1991 the complainant told the Chief of Personnel that he wanted to compete in six specific "occupational groups" under Manual paragraph II.9.360.1, which reads:

> "If the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years ..."

In a memorandum of 24 December 1991 he gave the Chief of Personnel a list of the "occupational groups" for which he wanted the committee to consider him.

By a letter of 26 December the Chief of Personnel acknowledged the memorandum of 24 December and promised to tell the complainant of "any change pertaining to your status" if there was one.

The committee reported to the Chief of Personnel on 13 January 1992 that in only one of the categories - that of statisticians - was there a post available but the complainant was not "well-suited" for it within the meaning of Manual paragraph II.9.360.1 since he had not in the last 15 years held a post in that group at the same grade as the one being abolished or at one grade lower.

By a letter of 19 February 1992 to the complainant's counsel the Chief of Personnel said that the completion of the committee's work had not brought about any change in the complainant's "status".

On 24 February 1993 the Headquarters Board of Appeal reported on his appeals against the reports and termination; it recommended rejecting all his claims.

In a letter of 21 April 1993, the decision he impugns, the Director endorsed the Board's recommendation.

B. The complainant submits that the reports appraising his work in 1988-89 and 1989-90 and the notice of termination are unlawful.

Staff Rule 530.3 requires the supervisor to appraise performance "in relation to the actual duties and responsibilities of the post". Manual paragraph II.5.50 says that "The appraisal is made by reference to the duties and responsibilities in the post description ... which should therefore be kept up to date at all times ... In addition, for professional staff, the appraisal is also made on the basis of achievement of 'planned activities' ..."

At the material time the complainant's post description, which was drawn up in 1968, was badly out of date. That had been plain for many years: his supervisor began calling for revision in the report for 1976-77. The reports for 1988-89 and 1989-90 both deplore the mismatch between what his department was doing and what his post description said. The out-of-date description could not serve as the basis for the appraisals, which were therefore in breach of Rule 530.3. The "planned activities" to which Manual paragraph II.5.50 refers are additional criteria and do not prevail over the reference to the post description in the Rule.

In Judgment 665 (in re Dutta) the Tribunal held that failure to give a staff member enough time between appraisal reports to come up to scratch was a fatal flaw. On that score it is plain that the complainant's report for 1989-90, which his supervisor drew up at the same time as the one for 1988-89, should be removed from his file. Inasmuch as his second-level supervisor completed the appraisal for 1987-88 only five months before the complainant filled up his part of the report for 1988-89, that report showed the same flaw.

As to the notice of termination he points out that until the reduction-in-force procedure has been carried out there is no telling whether the incumbent of an abolished post is to have his appointment terminated. Since the PAHO had not completed - or even begun - the reduction-in-force procedure before it gave him notice, the notice was premature.

In any event the procedure itself was flawed. In its report of 13 January 1992 the reduction-in-force committee declared that the complainant was not "well-suited" for work as a statistician under Manual paragraph II.9.360.1. That provision describes under what conditions a candidate may be "presumed" to be well-suited: but the committee failed to go beyond the realm of presumption to establish, as it must, whether he really was well-suited. So it was again too early to send out a valid notice of termination.

He wants the Tribunal to order his reinstatement as from the date of "dismissal"; the resumption of the reduction-in-force procedure; the removal from his file of the appraisal reports for 1988-89 and 1989-90; the inclusion in his file of a note explaining the reason for the removal of the two appraisals and "indicating that the same would have been done to the 1987-88 appraisal had it been appealed"; and awards of moral damages and costs.

C. In its reply the PAHO submits that it treated the complainant fairly. He is wrong to blame it for failing to update his post description: that would have put paid to his career since neither his department nor the Organization needed an engineer. Though it tried to get him to improve his skills, lack of initiative and imagination kept him from moving with the times and turning his old job into one that met his department's needs. Revising his post description was, after all, something he could be expected to cooperate in.

Under the circumstances it was reasonable, and in keeping with the Personnel Department's guidelines on drafting appraisal reports, to base the appraisals of him on "planned activities".

As to the delay in preparing his report for 1988-89 the complainant himself held it up by submitting his self-appraisal more than a year after it was due, and it took him nearly three months to answer his supervisor's comments on the report for 1989-90.

After giving him timely notice of termination the Organization was willing to reverse that decision as a result of the reduction-in-force procedure. Insofar as it had promised to tell him of any change in his favour the delay was not to his detriment anyway. The committee did not misconstrue Manual paragraph II.9.360.1: the material procedure is an exceptional one reserved for candidates who held a post in a different occupational group. Having determined that the complainant had not worked as a statistician, the committee quite properly deemed him unsuitable for a post in that group.

D. In his rejoinder the complainant seeks to rebut the arguments in the reply. It was for the Administration, not him, to change his post description. Instead of expecting him to adapt it had only to train him for another job. Planned activities may be covered by appraisal only insofar as they relate to an official's post description: else they might endanger the whole system of grading.

According to the case law notice of termination must come after the reduction-in-force procedure, not during or before it.

As for the difference between a "presumption of well-suitedness" and "well-suitedness" he points out that an official may be qualified to work in a field without ever having done so. That is why under II.9.360.1 the committee has a duty to establish whether he was qualified to compete as a statistician.

E. In its surrejoinder the PAHO maintains that in view of the complainant's career and performance its treatment of him was warranted and fair. It never denied being responsible for changing his post description: but for want of some effort on his part the abolition of his post was "inevitable". The notice it gave him of termination complied with both 1040, on expiry of contract on "completion of temporary appointments", and 1050, on abolition of post. In any event the reduction-in-force committee's assessment of his qualifications was sound.

CONSIDERATIONS:

1. The complainant is by training a chemical and industrial engineer. He joined the PAHO at headquarters in Washington D.C. in 1968 as a scientist at grade P.4. He was in

charge of the "operations research" unit in the Department of Research Coordination (DRC). His main duties, as set out in the description of his post, were to "plan, develop, organize and direct the work of operations research" and advise the chief of DRC and the Director of the PAHO in that technical field.

The complainant's appraisal reports

2. In a report, signed on 2 January 1991, appraising his performance from 1 December 1988 to 1 December 1989 his first-level supervisor, the chief of DRC, gave him the general rating "unsatisfactory". In detailed comments dated 22 February 1991 the complainant said that he needed a new post description and that the duties assigned to him in the work programme had been adequately completed. In comments dated 22 March 1991 his second-level supervisor, the Deputy Director agreed with the first-level supervisor's evaluation and accused him of "a certain lack of initiative" in coping with "the changing requirements of the Organization".

3. In a report on his performance from 1 December 1989 to 1 December 1990 his first-level supervisor again rated it "unsatisfactory" and his second-level supervisor concurred. Again he commented that a new post description was required and that he had performed his duties adequately.

4. On 1 May and 14 June 1991 he gave notice of appeal within the prescribed time limits against the two appraisals. In its report of 24 February 1993 the Headquarters Board of Appeal held as to those two appeals that there were "no substantial irregularities" in the process of appraisal and recommended rejection. In a letter of 21 April 1993, the decision impugned, the Director of the Organization told the complainant, among other things, that he accepted that recommendation.

5. The complainant contends that the description of his post was out of date and that he was no longer being assigned work that corresponded to it. The PAHO replies that if the description had been revised he would have had to be replaced.

6. It must have been apparent to the complainant that over the years the Organization's needs for scientific research would change and he would be called upon to deal with new problems in his work. The appraisal reports contain adverse comment by his supervisors, especially on his lack of initiative, and there is no evidence before the Tribunal to suggest that their views were not honestly held or were prejudiced. He was given a proper opportunity to comment on those views and his comments form part of the reports. In the circumstances the Tribunal disallows his application for the removal of them from his personal file.

The reduction-in-force procedure

7. By a letter of 26 August 1991 the Chief of Personnel informed the complainant that his post would be abolished at 31 December 1991 under Staff Rule 1050, that his contract would come to an end in accordance with Rule 1040 and that the reduction-in-force procedures would be going ahead shortly.

8. The principles upon which those procedures are based are set out in detail under Rule 1050.2 and the procedures as established by the Director are set out in Manual provisions II.9.250 to 375. Rule 1050.3 further provides that termination under 1050 requires the giving of notice.

9. The ad hoc reduction-in-force committee set up to examine the complainant's case first reported to the Director of the Organization in a letter dated 8 October 1991. It said that it was "unable to find another post" for him in the same occupational group either at his grade or at one grade lower. Having been so informed, he asked the Chief of Personnel in a memorandum of 26 November 1991 that he be considered for several other occupational groups he listed. In a second report in the form of a letter of 13 January 1992 to the Chief of Personnel the committee reported that it could not find a post for the complainant. By a letter of 19 February 1992 the Chief of Personnel informed the complainant's counsel that the committee had "completed its assignment" but that the outcome had not resulted in altering the complainant's status.

10. In its second report the committee had explained that after examining "the Common Classification of Occupational Groups and the PAHO Staff Information Roster" it "could not find any post within the Organization" in four categories it named. Those categories corresponded to all but one of the occupational groups the complainant had listed. As to the one remaining group - "the Statisticians category" - it said:

> "... after analyzing the qualifications and experience of Mr. Ortiz, the Committee found that he is not well-suited for work corresponding to this group since Manual II.9, paragraph 360.1 provides that to be considered 'well-suited', he/she must have 'held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years.' Mr. Ortiz has not occupied such a post during the last 15 years."

11. On that score the committee fell into error. What Manual paragraph II.9.360.1 says is that a request for leave to compete for posts in a different occupational group -

> "is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group".

And the paragraph goes on:

> "He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years."

But the presumption does not deprive the committee of its discretion to consider a candidate well-suited for work in that group on the strength of his actual qualifications and experience. In this case the committee failed to exercise such discretion and so the reduction-in-force procedure has not been duly completed. It must therefore be restarted.

12. On 10 September 1991 the complainant's counsel filed an appeal on his behalf against the notice of termination of 26 August 1991 on the grounds that "reduction-in-force did not precede notice of termination". In the report of 24 February 1993 mentioned in 4 above the Headquarters Board of Appeal further held as to that appeal that, having regard to "the due execution of the [reduction-in-force] procedures by the Administration", it saw "no basis for reinstating the Appellant". In the impugned decision of 21 April 1993 the Director further informed the complainant of his acceptance of the Board's recommendation for rejection of the appeal.

13. The complainant contends that the notice dated 26 August 1991 is invalid, and the PAHO pleads that it was expressly given "subject to reduction-in-force procedure".

14. The Organization's plea fails. A notice given under Rule 1040, which relates to the completion of temporary appointments, is inapplicable when it is Rule 1050 that is being relied upon. Furthermore, Manual paragraph II.9.360 makes it plain that if a "candidate for retention" receives no offer of another post, final action is taken to terminate his appointment in accordance with Rule 1050. As was said in Judgment 1045 (in re Mitastein) under 3:

> "The procedures are set out in detail in the Manual ..., and it is clear that the Rules preclude the termination of an appointment until the reduction-in-force procedure has been completed."

and again in Judgment 1193 (in re de Anda) under 12:

> "Where a post is abolished compliance with the reduction-in-force procedure is a condition precedent to termination of the holder's appointment."

15. The complainant not having received any valid notice under Rule 1050.3, his contract was renewed by implication and remains in force. He is entitled to payment of the salary and allowances due under that contract less any indemnity or earnings he may have received in the meantime.

16. The reduction-in-force committee simply erred in interpreting the rules and there is no entitlement to damages for moral injury in such circumstances. The grant of arrears of pay to the complainant will afford him sufficient redress. But he is entitled to costs.

DECISION:

For the above reasons,

1. The Director's decision of 21 April 1993 is quashed.
2. The complainant is reinstated as from the date of his separation from service.
3. The Organization shall pay him in full the salary, allowances and any other benefits due to him under his contract, less any indemnity or earnings he may have received in the meantime.
4. It shall apply the reduction-in-force procedure to him in accordance with Staff Rule 1050 and the Manual.
5. It shall pay him 3,000 United States dollars in costs.
6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re MALHOTRA Judgment 1372

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Kashmiri Lal Malhotra against the World Health Organization (WHO) on 8 October 1993, the WHO's reply of 22 December 1993, the complainant's rejoinder of 11 March 1994 and the Organization's surrejoinder of 31 March 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Regulation 4.2, Staff Rules 410.4, 555 and 1230.1 and Manual paragraphs II.3.310 and II.3.340;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian citizen born on 14 January 1936, joined the staff of the WHO in 1964 as a secretarial assistant at grade ND.5 - formerly ND.4 - in the Organization's Regional Office for South East Asia (SEARO). His post was upgraded to ND.6 and he was promoted to that grade as from 1 May 1979. The WHO granted him a career-service appointment on 1 March 1989 as from 1 July 1988. Since 15 May 1989 he has been in the Health and Behaviour Unit, where he still holds grade ND.6. In May 1973 he got a within-grade increase for meritorious service under Staff Rule 555 and two further steps in January 1984 and again in January 1989 upon completing 20 and 25 years' service respectively.

In August 1990 the Administration put up for competition a post, No. 5.0343, as assistant II at grade ND.7. The complainant was one of 14 applicants. An ad hoc selection committee drew up a short list and submitted it to the Regional Director for final decision. On 15 October 1990 the complainant learned that the Regional Director had decided in favour of another candidate on 12 October 1990.

On 13 December 1990 the complainant announced his intention to appeal on the grounds of personal prejudice, incomplete consideration of the facts and failure to comply with the applicable Staff Regulations and Rules.

The regional Board of Appeal asked the Administration to produce all the papers it had submitted to the selection committee, to state whether its recommendation had been unanimous and, if not, to supply a copy of the dissenting opinion. The Administration refused on grounds of privilege.

In its report of 9 January 1992 the regional Board confined itself to the matter of compliance with the material procedure and rules since it could not compare the candidates' qualifications. It concluded that there were was not enough factual evidence to bear out the complainant's case and it was therefore unable to make any recommendation. By a letter dated 27 January 1992 the Regional Director informed the complainant that he rejected the appeal.

On 26 May 1992 the complainant put his case to the headquarters Board of Appeal, which in a report dated 25 May 1993 followed conclusions of the regional Board. It said that the dispute turned on how the selection committee had ranked the candidates and that the Administration's withholding material documents prevented it from settling the issue.

In a detailed letter of 6 August 1993, the impugned decision, the Director-General rejected the appeal and confirmed that the papers and record of the selection committee's proceedings were and would remain privileged.

B. The complainant alleges discriminatory treatment and relies on several earlier cases, in 1983, 1985 and 1990, in which the Administration made the reports of selection committees available to the regional Board.

He traces the obvious prejudice against him to his work as staff representative on several joint bodies, including the regional Classification Committee and the regional Board of Appeal. He cites procedural flaws that tainted his performance appraisal report in 1987 and the review of his applications for other vacancies in 1988 and 1990.

He also alleges non-observance of the Staff Regulations and Rules in his case. The "factor rating system", the outcome of an agreement between the Staff Association and management at SEARO, is intended to stop favouritism. He was first on the short list whereas the successful applicant was seventh and should not have been on the list anyway since, according to the rules and practice, there should not be more than five names on such a list. The Administration was in breach of good faith by submitting the list of all fourteen candidates to the ad hoc selection committee so as to allow the representative of the Regional Director to impose his preference.

Manual paragraph II.3.340 says:

> "Before a meeting of a selection committee, all applications are reviewed by the unit concerned and a short list of those candidates who seem to be the most suitable for the post is drawn up. ... Brief curricula vitae of the candidates and the comments of the reviewing unit(s) are included with the short list ..."

The Administration did not comply with that paragraph: the members of the committee did not see the candidates' confidential files until the meeting had begun and so had no time to study them. What is more, the officer representing the relevant department at the meeting did no more than make known his own preference. That was in disregard of the whole purpose of the selection process: Judgment 1049 (in re Dang, Kapoor and Seshadri). That officer is at the Organization's beck and call anyway since it agreed to extend his appointment beyond retirement. The WHO's real reason for refusing to disclose the committee's records was to cover up procedural mistakes.

The complainant alleges breach of Staff Rule 410.4 which reads:

> "Posts below the level of director ... which become vacant shall normally be announced to the staff if they represent a promotional opportunity for any staff, and selection for such posts shall normally be on a competitive basis. These requirements shall not apply to any post which it is in the interest of the Organization to fill by reassignment of a staff member without promotion."

In this case the successful candidate was promoted, not reassigned.

The regional Board failed to establish that the selection process squared with Staff Regulation 4.2, which says:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. ..."

In the complainant's submission only the personal views of members of a selection committee are privileged.

He asks the Tribunal to quash the appointment made to post 5.0343 and declare him the successful candidate; award him 30,000 United States dollars in compensation for "grave injury, moral prejudice, mental torture, and loss of reputation"; and grant him 5,000 dollars in costs.

C. In its reply the WHO rejects his allegations of breach of the Staff Regulations and Rules and of personal prejudice.

Manual paragraph II.3.310 empowers regional offices to set up selection committees, and they are to include the head of the service in which the vacancy lies. It was in that capacity that the administrative officer who represented the Regional Director took part in the selection process and expressed his views to the committee.

Besides the factor-rating system, which affords the basis for the short list, the selection committee considers the nature of the vacancy and the opinion of the unit in which it is. Judgment 251 (in re De Sanctis) said that the "most important" criterion is "fitness for the vacant post" and Judgment 564 (in re Ali Khan) that "seniority does not always mean greater merit".

The WHO takes up the complainant's arguments and seeks to refute them. In keeping with the rules the Administration makes candidates' personal files available to selection committee members upon demand and did so in this case. The committee drew up a short list; there is no rule that limits the number of candidates that may be on it. The complainant was not first on the list nor was the successful candidate seventh. Contrary to the complainant's allegations, the selection committee made a unanimous recommendation. The WHO will produce the minutes of its meeting if the Tribunal wishes.

The Organization denies the charge of bias against the complainant on account of his activities as staff representative. Staff associations are an integral part of the structure of all United Nations agencies. So it is wrong to presume that the opinions staff representatives freely express in joint bodies may provoke discriminatory treatment. The complainant offers not a jot of evidence to back up his accusations. The Administration has time and again shown how it values his services: did it not award him a merit increment in 1973 and exceptional two-step increases, also for merit, in 1984 and 1989, when he was particularly active as staff representative?

The complainant avoids personal attack on those responsible for the disputed decisions, namely the Regional Director and the Director-General; his prime target is the administrative officer in the Regional Director's office for his part in the work of the selection committee. Inasmuch as the committee's proceedings are privileged the complainant's allegations rest on hearsay and speculation and must therefore be discounted.

The Organization's policy is to safeguard the confidentiality of documents put to or coming from selection committees in order to preserve their members' freedom of choice and shelter them from outside pressure. Candidates also have a stake in seeing that their weaknesses are not disclosed. But the Organization is willing to produce whatever documents the Tribunal may wish to see. It could thus establish that (1) the complainant did not get the highest rating and the successful candidate was not in seventh place; (2) the successful candidate was not the most junior in service or grade on the short list and his work was not inferior to the complainant's.

The selection process is not tainted with formal or procedural flaws, or mistakes of fact or of law, and the Organization therefore invites the Tribunal to dismiss the complaint.

D. In his rejoinder the complainant enlarges on his pleas and presses his claims. He cites guidelines adopted by the International Civil Service Commission which make seniority decisive in distinguishing candidates ceteris paribus. He maintains that the members of the selection committee could hardly do justice to fourteen personal files in thirty-five minutes, the less so since debate between the president of the Staff Association and the administrative officer from the office of the Regional Director took up most of the time while the other members kept silent. No selection committee would choose a candidate ranked seventh without special reasons or unless it simply overlooked the six other applications. A selection process based solely on subjective considerations is in breach of the material rules; that in itself is enough to show injury.

E. In its surrejoinder the WHO points out that if seniority had been the overriding criterion the complainant would not have won the competition anyway, since other candidates were senior to him. It sets out the stages of the selection process at SEARO and headquarters in Geneva. It presses its pleas.

CONSIDERATIONS:

1. In 1964 the complainant joined the WHO at grade ND.5 in its Regional Office for South East Asia (SEARO) in New Delhi. His post was upgraded to ND.6 and he was promoted to that grade in 1979. Since 1989 he has been working in the Health and Behaviour Unit, still at ND.6. His complaint is that the Organization did not choose him for a post as assistant II at grade ND.7 in 1990.

2. In August 1990 a notice of vacancy was issued for that post, which was in the Regional Director's own office.

Selection for the post was subject to a prescribed procedure of which the main features are the following:

(a) An ad hoc selection committee is set up as required in the Regional Office's Policy and Procedure Handbook.

(b) Upon receipt of applications in answer to a notice of vacancy standard information on each candidate is prepared by the Personnel Department, which applies the "factor rating system". The committee takes into consideration length of service (35 points), performance (35 points), education (20 points) and experience (10 points), up to a maximum of 100 points. The Personnel Department submits to the committee, usually one week beforehand, a scoring sheet and work sheets about all candidates.

(c) Before meeting, the members of the committee may if they ask see the applicants' personnel files.

(d) The committee sets its own "cut-off" point in drawing up a short list, but takes into account the "clustering" of applicants whenever their scores come close together. A "cluster" is described as a nucleus of scores similar in value and distinctive as a group as against all others.

(e) The minutes of the committee's meeting include its recommendation, and the Regional Director makes the final selection.

3. The following are arguments which the complainant put to the regional Board of Appeal but which the Organization contested.

(a) The ad hoc selection committee stretched the short list beyond the point of clustering so as to include the selected candidate.

(b) Due consideration was not given to the factor rating sheets and to the relative positions of the complainant and the selected candidate. He had 27 years' service as a secretary and was ranked first on the short list, whereas the selected candidate had only the minimum of five years' service as a secretary and came only seventh on the short list.

(c) There was strong dissent.

4. The regional Board held that it could not go into the applicants' merits and ranking and decided to consider only the question of compliance with the rules and procedures for selection. It took the view that it required further information and asked the Administration, among other things,

(a) to provide the background papers submitted to the committee including the factor-rating sheets relating to all candidates, the short list prepared for the said selection, if any, and other related documents; and

(b) to say whether or not the recommendation had been unanimous and, if not, to supply the text of the "dissenting note".

5. The Organization refused to comply on the grounds of privilege. The Board did not press the matter. In its report dated 9 January 1992 it did express the view that the selection committee should have given due consideration to the complainant's seniority, performance, education, experience and so forth; but it felt unable to "make any recommendation" for want of "factual evidence".

6. In a letter of 27 January 1992 to the complainant the Regional Director observed that the Board had found "no factual evidence to support [his] contentions", accepted the Board's conclusions and notified rejection of his appeal.

7. The complainant then went to the headquarters Board of Appeal. In its report of 25 May 1993 it too said that it felt "constrained by the lack of factual evidence to the extent that it could not make any recommendation". It observed that "the one central issue concerned the factor rating and listing procedures applied by the [selection committee] in reaching their decision" and that, having "had no access to these elements, it had no basis upon which to resolve that issue". It suggested "a change in the availability rules for selection matters in regard to Appeal Board hearings which are strictly confidential, or the creation of a different process for appeals on selection matters wherein the essential information could be made available".

8. By a letter of 6 August 1993 the Director-General informed the complainant of the rejection of his further appeal and confirmed the impugned selection. The complainant is asking the Tribunal to quash that selection, declare him appointed to the post and award him damages for moral injury and costs.

The issue of privilege

9. To justify withholding the documents sought by the regional Board the Organization relies mainly on a memorandum dated 28 March 1983 which the Director-General addressed to the chairman of the headquarters Board of Appeal in the context of another case and which said:

> "In future, in order to protect the indispensable confidentiality of selection documentation, the content of Ad

> Hoc or Senior Staff Selection Committee papers shall be disclosed neither to staff members who have applied for a vacancy notice, nor to the Ombudsman, nor to Appeal Boards.
>
> Such selection documents constitute part of internal working files and cannot therefore be made available for consultation by staff members ... Confidential status was conferred on such files, and will be consistently maintained in the future, for the following obvious reasons:
>
> It is essential and in the best interests of the Organization that, when assessing candidates and submitting recommendations for selection, supervisors and members of Selection Committees should be free - within the selection committees' scope and terms of reference - to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must also be guaranteed in order to protect the interests of third parties, i.e. other candidates for the vacancy."

10. Only from examining the documents sought by the regional Board in this case would it have been possible to determine whether, as the complainant was contending, the short list had been improperly stretched to favour the successful candidate and due weight had not been given to comparison of seniority, performance and experience as between him and the successful candidate. For example, if a member of the ad hoc selection committee had dissented, the reasons for the dissent might well have had some bearing upon those contentions. The factor-rating sheets, too, and the minutes and recommendation of the selection committee, including any dissenting note, were all part of the proceedings. When the Organization declined on the grounds of privilege to disclose the information and documents called for by the regional Board it withheld items that formed part of the proceedings leading up to the impugned decision and prevented determination of what the headquarters Board rightly called the one central issue, namely "the factor rating and listing procedures applied by the [ad hoc selection committee] in reaching their decision".

11. As the Tribunal held in Judgments 1177 (in re Der Hovsépian) under 5 and 1323 (in re Morris No. 2) under 9, an item that forms part of the proceedings that led to the impugned decision may not be withheld from scrutiny by the Tribunal. That holds good for any appellate body. So the Administration ought to have disclosed to the regional Board the documents it required to enable it to take up the complainant's appeal properly.

12. That rule applies equally to the views expressed by members of the ad hoc selection committee. Since there was a right of appeal against the selection based upon the committee's recommendation, both the regional and the headquarters Boards were entitled to review the reasons for the selection and for the recommendation so as to ascertain whether there had been some fatal flaw such as an error of fact or of law, personal prejudice or arbitrariness. The failure to disclose the views expressed by those who had made the recommendation frustrated the appeal proceedings.

13. From the circumstances recounted above the Tribunal concludes that there was no proper examination of the complainant's appeal by the regional Board or by the headquarters Board and that the decision of 6 August 1993 by the Director-General based upon the latter's recommendation cannot stand. The regional Board and then, if need be, the headquarters Board must take up the complainant's appeal anew in the light of full records of the ad hoc selection committee's proceedings.

14. The complainant has been denied due process in his internal appeals and the Tribunal therefore awards him 3,000 United States dollars in damages for the moral injury thereby caused to him. It also awards him costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 6 August 1993 is quashed.

2. The case is sent back to the Organization so that the regional Board of Appeal and, if need be, the headquarters Board of Appeal may take up the complainant's appeal anew.

3. The Organization shall make available to the Boards of Appeal the full records of the ad hoc selection committee's proceedings for the purpose of appeal.

4. It shall pay the complainant the sum of $3,000 in damages for moral injury.

5. It shall pay him $500 in costs.

6. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL   INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF   *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SEVENTH SESSION

In re KOGELMANN (Nos. 1, 2, 3 and 4)
(Interlocutory order)

Judgment 1373

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Edith Kogelmann against the International Atomic Energy Agency (IAEA) on 18 March 1993 and corrected on 22 April, the Agency's reply of 10 August, the complainant's application of 1 September for the production of documents, the IAEA's submissions of 13 October 1993, the complainant's rejoinder of 17 January 1994 and the Agency's surrejoinder of 8 April 1994;

Considering the second complaint filed by Miss Kogelmann against the IAEA on 18 March 1993 and corrected on 22 April, the Agency's reply of 10 August, the complainant's application of 30 August for the production of documents, the IAEA's submissions of 13 October, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering the third complaint filed by Miss Kogelmann against the IAEA on 18 March 1993 and corrected on 21 April, the Agency's reply of 10 August, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering the fourth complaint filed by Miss Kogelmann against the IAEA on 14 July 1993, the Agency's reply of 17 September, the complainant's rejoinder of 1 December 1993 and the Agency's surrejoinder of 4 February 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Rules 7.04.1 and 12.01.1(D) of the IAEA's Provisional Staff Rules, Articles 11, 36, 38, 40 and 41 of Appendix D to those Rules and Article II.7.73 of the Administrative Manual;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian who was born in 1933, joined the staff of the IAEA in 1965 as a technician at grade G.4 in the physics section of the Agency's laboratory. She retired on 31 March 1993 at G.7.

In 1970 she became a laboratory technician in the IAEA's isotope hydrology laboratory, then housed in underground premises. In 1979 the laboratory moved to modern quarters at the Vienna International Centre (VIC).

The complainant's duties included testing water samples for radioactivity by liquid-scintillation counting. From 1970 to 1985 she worked with a chemical substance based on a solvent known as xylene, which the supplier warned might have toxic effects on the skin, eyes, mucous membranes and central nervous system. In 1986 and 1987 she worked with another solvent, trimethylbenzene, to which the supplier attributed the risk of similar effects.

The complainant's sick leave in 1986 came to 63 days, as against 30 in 1983, 26 in 1984 and 27 1/2 in 1985.

By a memorandum of 7 December 1987 to the Deputy Director of Personnel her supervisor announced that she was to undergo treatment in hospital for symptoms which she thought the chemicals she was working with might have caused; he said she had failed to comply with the "rules" on safety; he enclosed a set of guidelines he had issued on 19 December 1986 and stated that "according to the information available about toxicity" there was no danger to her health from her use of trimethylbenzene.

In a memorandum of 29 December 1987 to the Deputy Director she asked how she might have complied with safety rules that she did not see until late 1986 and that even then made no mention of the chemicals which she had been using, and which her supervisor did not consider toxic anyway; she also expressed concern about the meaning of safety instructions her supervisor had given her on 23 December 1987.

On 4 October 1988 the head of the toxicology information centre of the University of Vienna sent the chief medical officer of the VIC a report on the complainant's health linking her dermatological, neurological and other symptoms to the solvents, traces of which he had found in her blood.

By a memorandum of 21 October 1988 the IAEA's chief medical officer recommended that the head of the complainant's section should relieve her of work involving scintillation "cocktails" for three months and avoid exposing her to the solvents; he announced that before deciding any further measures he would have her blood tested against samples from other officials who worked in "the same occupational conditions".

In a memorandum of 17 November 1988 the complainant pointed out that comparative tests of her blood were not possible because no-one else had worked with the same chemicals for so long and she asked to be relieved of working with the solvents without further blood tests.

In a memorandum of 24 November 1988 to the Director of Personnel her immediate and higher-level supervisors said they had taken her off work with the solvents; observed that her average exposure to them had been two hours a week; concluded that her exposure to them was at worst only 1 per cent of the maximum allowable level; and suggested that there had never been any case of chronic intoxication from working with them elsewhere.

In a memorandum of 12 December 1988 to the acting Director of Personnel she set out her version of the facts for the file: her weekly exposure from 1970 to 1985 had been between eight and ten hours a week; the Administration had not informed her that the chemicals she had been using were toxic until December 1987, when it directed her to change her working methods; Austrian law required technicians working with chemicals to observe special precautions but the IAEA had left her unaware of them and exposed for 17 years.

On 10 January 1990 three doctors at the Clinic for Occupational Medicine of the University of Vienna reported that they had found neurological evidence of "chronic solvent intoxication" but were not sure whether solvents were to blame for her lung and liver disorders too.

In a letter of 15 February 1991 to the Director General the complainant's counsel claimed compensation on her behalf for service-incurred illness and suggested that the Agency should send her to the Medical University of South Carolina (MUSC) for diagnosis and treatment.

In a memorandum of 28 February the Director of Personnel referred her to the provisions in Appendix D of the Staff Rules on compensation for service-incurred illness and invited her to submit information on her claim as set out in the rules.

Having informed the Director in a letter of 1 March 1991 that she was "a very sick person with a fatal illness" and in great pain, she sent him in a memorandum dated 6 March the information he had asked for. The Administration then referred her case under Article 38 of Appendix D to the Advisory Board on Compensation Claims.

On 27 May the head of the Clinic for Occupational Medicine told the chief medical officer that on examination of the complainant on 13 April he had found evidence of scleroderma and concentrations of solvents in her blood above the maximum allowable values; lacking a full understanding of her case he suggested that she consult specialists in America.

At a meeting of 6 June 1991 the Board recommended in pursuance of Article 36 of Appendix D that she should go to MUSC for examination; it also decided to seek information from the Austrian authorities on the results of their inspection of her working conditions.

By a letter of 24 June 1991 the acting Director of Personnel told her to report to MUSC on 1 July. A rheumatologist examined her there from 1 to 11 July.

The rheumatologist said in a "hospital-discharge summary" that he found no evidence of scleroderma and that her "mild cerebral, mild liver, and mild lung abnormalities do not fit into a known toxicologic diagnosis in our experience".

In a memorandum of 7 October 1991 the secretary of the Advisory Board told her that the Director General had endorsed a recommendation from the Board of 26 September to dismiss her claim. By a letter of 4 November 1991 she asked the Director General to review his decision under Article 40 of Appendix D and named a doctor she wanted to sit on the medical board which reports under Article 41 to the Advisory Board on Compensation Claims.

On 8 November 1991, having exhausted her entitlement to sick leave with full pay, she went on half pay.

The members of the medical board were the Agency's chief medical officer, the doctor she had appointed and a third doctor chosen by the other two. The third member, who did not examine her, served as chairman.

The board met on 12 December 1991. It said in a report dated "January 1992" that it had found no evidence of systemic sclerosis or any other solvent-related symptoms and it described her exposure to the solvents as "infrequent, at low concentration and of short duration".

After meeting again on 4 February 1992 the Advisory Board recommended that the Director General should maintain his earlier decision.

By a telegram of 12 February the acting chief medical officer asked the complainant to report for a medical examination. On 17 February her doctor sent him a certificate saying that she was unfit to work until further notice. In a telegram dated 17 March 1992 the Director of Personnel told her that since she had not reported for an examination or supplied a "medical status report" he was unable to authorise further sick leave.

On 20 March her doctor reported to the medical officer that she was suffering from lung, liver, brain and other disorders.

By a letter dated 27 March the chairman of the medical board told her the Director General had decided to uphold his decision of 7 October 1991.

In a letter of 30 March the Director of Personnel informed her counsel that she was in breach of Staff Rule 7.04.1 for failing to provide the medical officer an "acceptable" medical certificate with the nature of her illness and expected date of recovery.

The acting chief medical officer having examined the complainant on 13 April told her by a letter of even date postmarked 21 April 1992 that after "your full examination by me" he was ending her sick leave on 17 April and considered her fit to work on 21 April.

By a telegram of 23 April the Director of Personnel confirmed the chief medical officer's decision of 13 April and said he "reserves the right to take appropriate action" on what he considered to be her "unauthorized absence".

The Director of Personnel informed her counsel in a letter of 6 May that since the Administration had established "in accordance with the Staff Rules" that she was fit to go back to work on 21 April it regarded her absence from that date as unauthorised.

In a letter of 11 May she asked the Director of Personnel to refer her case to an independent practitioner under Staff Rule 7.04.1(L).*

By a telegram of 13 May 1992 the Director agreed and indicated that her pay status - which he said his telegram of

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* Provisional Staff Rule 7.04.1(L) reads:

"A staff member may be required at any time to submit a medical certificate regarding his health or to be examined by the Medical Officer of the Agency. Further sick leave may be refused or the unused portion withdrawn if the Director General is satisfied that the staff member is able to return to his duties, provided that, if the staff member so requests, the matter shall be referred to an independent practitioner acceptable both to the Director General and the staff member."

23 April referred to - would not be "reconsidered" until the independent practitioner's report came in.

In a letter of 25 May the complainant asked the Director General to review his decision to reject her claim to compensation and she alleged a mistaken finding by the medical board. In a letter of 16 June the Director General refused to reverse his decision.

In four letters she sent between 11 June and 7 July she asked the Director General to review under Rule 12.01.1(D)(1) the decisions on her fitness for work and pay status which the Director of Personnel had notified on 23 April and 6 May.

In a letter of 10 July to which the Director of Personnel appended the report of the doctor who examined her in pursuance of 7.04.1(L) the Director of Personnel told her that the period from 21 April 1992 until she reported back for duty would be charged to her annual leave if she had enough left or treated as "leave without pay"; he warned her that failure to return to work might lead to non-extension of her contract, which was to expire on 31 August 1992.

By a letter of 14 July she asked the Director General to review the Director's decision of 10 July.

In another letter of 14 July she asked the Director of Personnel to extend her sick leave on the grounds that her doctors did not want her to work, pointing out that the conclusions of the independent practitioner were "subject to neurological and psychological examinations".

On 15 July she appealed to the Joint Appeals Board against the Director General's decision of 16 June.

In a letter dated 16 July the Director General upheld the decisions of 23 April and 6 May.

She put objections to the letter of 16 July to the Appeals Board on 14 August.

On 26 August she lodged an appeal against the Director's decision of 10 July.

By a telegram of 28 August 1992 the Director authorised review of her "neuro-psychiatric condition" under 7.04.1(L); he also gave her the first in a run of extensions of contract that took her up to retirement on 31 March 1993.

In a letter of 19 October 1992 her counsel asked the Director of Personnel to indicate, among other matters, when her entitlement to sick leave on half pay ran out and why she had not got the benefits due under the Agency's Temporary Disability Insurance Plan (TDIP).*

In his reply of 9 November the Director set out her record of sick leave as follows:

> "Sick leave during last four years = 89 days
> Sick leave with half pay from 1991.11.08 to 1992.08.08
> Sick leave on full pay from 1992.08.09 to 1992.09.25
> Sick leave with no pay from 1992.09.26".

He also said that because the chief medical officer had not certified sick leave for her beyond 17 April 1992 she did not qualify for TDIP benefits.

In its report of 16 November 1992 the Joint Appeals Board recommended rejecting her appeal of 15 July and in a letter of 22 December 1992 the Director General followed the Board's recommendation. That is the decision she impugns in her first complaint.

As to her appeal of 14 August the Board further recommended on 16 November that the Director General put her on special leave without pay as from 11 May 1992. But the Director General decided, also in his letter of 22 December 1992, not to follow that recommendation and that is the decision she impugns in her second complaint.

Also on 16 November 1992 the Board concluded that it was not able to make any recommendation on her appeal of 26 August since there had not yet been final assessment of her fitness to work. In his letter of 22 December 1992 the Director General said he would decide "whether my previous decision should be upheld or whether your sick leave status should be reinstated" after he had got a further medical opinion on her. That is the decision she challenges in her third complaint.

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* Article II.7.73 of the Administrative Manual on social security reads:

"The TDIP provides the following benefits:

(i) If a staff member continues to remain sick after he/she has exhausted his/her entitlement to sick leave on full pay, he/she will receive for the period of his/her authorized sick leave on half pay an additional benefit corresponding to one quarter of his/her net emoluments;

(ii) On exhaustion of sick leave with half pay, the staff member will receive benefits in the amount of half his/her net emoluments for a maximum period of twelve months."

In a letter of 27 November she asked the Director General to review the Director of Personnel's decision to withhold TDIP benefits. The acting Director General refused in a letter dated 29 December 1992 and she put that case to the Appeals Board on 28 January 1993.

In a report dated 11 May 1993 the Board recommended paying the complainant the TDIP benefits due from May 1992 to March 1993. In a letter of 15 June 1993 the Director General rejected her appeal. That is the decision impugned in her fourth complaint.

B. In her first complaint she submits that her illness is service-incurred and puts forward three main pleas.

She contends first that the Director General overlooked essential facts. By accepting the medical board's finding that her weekly exposure was "infrequent, at low concentration and of short duration" he failed to consider the high levels of exposure she had experienced over three overlapping periods: from 1970 to 1979, when she worked in an unventilated cellar; from 1970 to 1985, when she was pipetting scintillation cocktails into vials without special precautions; and from 1970 to December 1987, when used vials were stored in her work room. The board considered her working conditions only after December 1987, by which time changes in procedure had brought her exposure down to two hours a week.

She alleges that the Administration did not give each member of the board access to the same documents, that it passed off her supervisor's rough estimate of her "worst-case" exposure as a reliable one, and that it never got a report from the Austrian authorities on working conditions in her laboratory despite the call for one by the Advisory Board on Compensation Claims.

Her second plea is that the Director General misappraised evidence in the experts' reports. The medical board misread tests on concentrations of one solvent in her blood as if they applied to another she had used in safer conditions. Although the head of the Clinic for Occupational Medicine in Vienna reported in May 1991 that the solvents were responsible for her psychiatric condition the Director General took that doctor's reservations about what might have caused scleroderma to apply to all her symptoms. He gave greater weight to the findings of the American rheumatologist than to the report of an Austrian toxicologist.

Her third plea is breach of procedure. Although a biopsy carried out by the Institute of Pathology at Klagenfurt, in Austria, prompted the diagnosis of scleroderma in December 1990, the Director General discounted that diagnosis in favour of the American rheumatologist's conflicting one. In cases where two diagnoses clash the proper procedure is to call for a third one. But the Administration never even told the American doctor about the first one. In any event a third biopsy the complainant had in Vienna in January 1993 confirmed the results of the first one.

She submits that the involvement of the Agency's chief medical officer at all levels of the proceedings was in breach of the case law. When an official is open to suspicion of partiality he should not be allowed to sway the Director General's decision.

The complainant acknowledges that the burden is on her to prove that her illness is service-incurred. But, as the Tribunal said in Judgment 641 (in re Farah), she need only show that there was a "fairly definite connection between the cause and the effect". She has submitted medical reports and test results which link her illness to exposure to solvents at the IAEA.

She says that the health risks the Agency exposed her to went beyond her contractual obligations. Although she relied on her employer for reliable safety information it failed to measure her exposure for 18 years to toxic substances, to inform her of the toxic properties of substances she was using and to take proper safety measures. Its negligence warrants damages above the limit in Article 11 of Appendix D, which says that "... compensation payable under these rules shall be the sole compensation to which an official ... shall be entitled in the event of death, injury or illness attributable to the performance of official duties".

She seeks full compensation for permanent total disability, in particular the refund of past and future medical expenses not covered under her insurance, payment of salary including the grant of annual increment to retirement on 31 March 1993, compensation for annual leave, an award of damages for partial loss of injured organs and for loss of enjoyment of life and reduction in life expectancy, and the "provision of [her] complete retirement program" including the end-of-service allowance. Insofar as the compensation scheme under Appendix D does not meet those claims she "repeats all her claims and claims further damages to the fullest extent of all her claims". She also claims an award of costs.

C. In her second complaint she submits that she was at the material time on authorised sick leave and relies on procedural flaws as well as mistakes of fact and law. She accuses the Administration of departing from the rules on determination of fitness for duty; allowing the medical officer to exceed the scope of his authority; and misapplying the rules on pay applicable to staff members who belong as she does to the Austrian Health Insurance Scheme.

She wants the Tribunal to declare that she was on sick leave between 21 April and 10 July 1992; quash the decision to suspend her pay over that period and award her interest on the amounts due; remove from her personal file allegations that she failed to comply with the rules; pay her medical and legal fees, which she sets at 170,000 Austrian schillings at 14 August 1992; and award her damages for material and moral injury.

D. In her third complaint she submits that the Director General committed a mistake in law by linking her pay status to her sick leave: there is no provision in the rules for referral of an official's pay status to an independent practitioner. As long as the referral of her case under 7.04.1(L) was pending she was entitled to sick leave. She also relies on the same mistake of fact she pleads in her second complaint.

She seeks the quashing of the Director of Personnel's decision of 10 July 1992; payment of the sums due from 10 July to 24 September 1992 plus interest; removal from her personal file of "any prejudicial reference" to the decision of 10 July; moral and material damages; and costs.

E. In her fourth complaint she submits that the withholding of TDIP benefits was unlawful. As in her second complaint she alleges that the Director General was wrong to treat her absence from 23 April 1992 as unauthorised. She also alleges mistakes of law, notably breach of paragraph II.7.73(ii) of the Administrative Manual, which says that staff members "will receive benefits" on exhaustion of entitlement to sick leave with half pay. The provision being compulsory, applying it is not a matter of discretion; nor is there any need to consult the medical officer. To qualify for the benefits she had only to be a staff member, as she was, and to have exhausted her entitlement to sick leave on half pay, as she had.

She seeks the quashing of the Director General's decision; payment of TDIP benefits to 30 March 1993 plus interest and "inflation adjustments"; and awards of material and moral damages and costs.

F. In its reply to her first complaint the Agency submits that her claims are in part irreceivable and in part settled and that all are in any event devoid of merit.

She failed to file an internal claim to compensation beyond what Appendix D allows under the applicable appeal procedure. So the claim is irreceivable under Article VII(1) of the Tribunal's Statute because she has not exhausted the internal means of redress. Besides, Article 11 of Appendix D, which she accepted on taking up appointment, says that the compensation payable under Appendix D "shall be the sole compensation to which an official ... shall be entitled ...".

The IAEA observes that it settled her claim to completion of her retirement programme: she applied for retirement benefits in June 1993 and has since completed the formalities.

On the merits the Agency contends that her own account of her illness does not square with the objective views of the doctors who examined her: she described herself in March 1991 as "a very sick person with a fatal illness" but not one of the many medical reports in the file describe her as "fatally ill". According to the medical board she was suffering from various mild ailments and had a "neurotic personality".

In any event she has failed to show that her alleged illness is directly attributable to the performance of her duties. For her claims to succeed it is not enough to show that the chemicals she used have toxic properties. The medical opinions she submits suggest only that some link between the state of her health and her working conditions is possible. But the medical board concluded that there was no "documented" evidence of damage to her nervous system from exposure to the solvents nor any "conclusive" evidence of lung damage from long exposure, though it did acknowledge laboratory evidence of a mild liver disorder which appeared to be on the mend.

Insofar as the Agency complied with the procedures set out in Appendix D the Tribunal is not competent to substitute its views for those of medical experts. Far from misinterpreting the experts' reports the Director General followed them. It is the complainant who is challenging them.

G. In its reply to her second complaint the IAEA points out that after her approved sick leave ran out on 13 March 1992 she neither went back to work nor submitted a medical certificate. Though she was already in breach of the rules at the time the Administration delayed action until it had an assurance following medical examination that she was fit for work. So it complied with the material rules and indeed treated her leniently.

H. In reply to her third complaint the Agency submits that the decision she impugns is not challengeable since it merely referred to the possibility of a change in her status on the strength of further medical opinion. The matter of her absence and pay status being covered by her second complaint, the subject of the third one is already before the Tribunal.

The Agency's pleas on the merits are those it put forward on her second complaint. Since an application for referral under 7.04.1(L) has no suspensory effect she derived no entitlement to sick leave from making one.

I. In its reply to her fourth complaint the IAEA submits that she was not eligible for TDIP benefits after 23 April 1992. Paragraph II.7.73(i) of the Administrative Manual limits payment of benefits to periods on authorised sick leave, whereas at the material time she was on unauthorised leave.

J. In letters of 30 August and 1 September 1993 to the President of the Tribunal the complainant applied for the production of further evidence of relevance to her first two complaints.

K. On 13 October the Agency supplied the ventilation plan of the complainant's working place from 1970 to 1979; a list of the documents it put to the medical board and of those submitted to its chairman; the appendices to the board's report; and the medical report on her examination of 13 April 1992. In an accompanying brief relating to her first complaint the Agency says that other information she was seeking - on her clinical and occupational history and exposure to solvents - is already in the medical board's report.

L. In her rejoinder on her first complaint she dwells on the facts of her illnesses and the IAEA's failure to issue proper safety instructions before December 1986. She enlarges on her earlier pleas and invites the Tribunal to order an independent expert to determine what exposure to the solvents she suffered;

she also applies for expert enquiry into such unsolved medical issues as the aetiology of her skin condition and other disorders.

She maintains that her claim to compensation beyond what Appendix D allows is receivable: she first filed the claim in her appeal of 15 July 1992 and the Board took it up in the report of 16 November.

The Agency has not yet settled her claim to completion of her "retirement program". Her end-of-service allowance would have been half as much again as she got. To obtain the normal retirement benefit in March 1993 she had to pay 197,507 Austrian schillings to the United Nations Joint Staff Pension Fund.

She objects to the IAEA's unwarranted attacks on her credibility. She had good reason to believe her life was in danger in 1990 after an open-lung biopsy and a skin sample led her doctor to diagnose systemic scleroderma, a life-threatening disease. The evidence on her skin condition is still "conflicting".

M. The rejoinder on her second complaint seeks to correct the factual record in the reply and to expand on her earlier pleas. She describes the reply as inaccurate and perfunctory. She questions the reasons for the Agency's arbitrary treatment of her. There was nothing lenient about infringing her right to sick leave: that, in her submission, amounts to a disguised disciplinary measure.

N. In her rejoinder on her third complaint she dwells on several factual errors in the reply. She denies trying to acquire an entitlement to sick leave through referral under 7.04.1(L) to another doctor. Besides, it was the independent practitioner who recommended getting the opinion of an "independent psychiatrist and/or neurologist". What she objects to is the first decision on her pay status following the independent practitioner's "partial determination" of her fitness for work. So the subject of her complaint is not already before the Tribunal.

O. In her rejoinder on her fourth complaint she argues that she had good reason to believe she was on authorised sick leave: the Administration had given her notice thereof; her doctor and Austrian insurer had certified her as unfit for work; and the examination of her neurological and psychiatric condition was still pending. In any event there is no mention of authorised sick leave in paragraph II.7.73(ii) of the Manual, nor any call for one.

P. In its surrejoinder on her first complaint the IAEA restates the facts as it sees them, rebuts the arguments in her rejoinder and presses its earlier pleas. The Agency's information policy and up-to-date safety measures ensure that there could not have been any health hazards in her laboratory.

Q. In the Agency's surrejoinder on her second complaint it denies material inaccuracies in its reply. Nor was its brief perfunctory. Its pleas on the merits answer her arguments in full without dwelling on the irrelevant issues she raises.

R. In its surrejoinder on her third complaint the IAEA observes that there are no new material facts or arguments in the rejoinder. If she had gone back to work as the Agency repeatedly asked it would have given her suitable duties.

S. In its surrejoinder on her fourth complaint the Agency denies that she was on duly certified sick leave. It maintains that her case hinges on whether both parts of II.7.73 require authorised sick leave: she has not shown why the requirement should apply to only half of the provision.

CONSIDERATIONS:

1. The complainant joined the staff of the International Atomic Energy Agency at grade G.4, step 1, on 1 September 1965 as a laboratory technician in the Physics Section. In 1970 she moved to the isotope hydrology laboratory. She eventually reached step 12 in G.7 and she retired on 31 March 1993, a fortnight after filing her first complaint. Her work included the testing of water samples for varying low-level radioactivity, and it required her to use scintillation fluids containing volatile organic solvents. From 1970 until March 1986 she worked with Instagel, a substance containing xylene, and from March 1986 until 1988 with Picofluor, which contains trimethylbenzene. Until 1979 the Laboratory was in a windowless basement on former premises of the Agency. In 1979 it shifted to the Agency's present premises, where there are both air conditioning and windows.

2. In its report the medical board which met on 12 December 1991 to deal with the complainant's case describes in the following terms the toxic properties of xylene and trimethylbenzene:

> "Xylene is an aromatic hydrocarbon that produces narcosis on prolonged exposure and may cause impairment of haemopoiesis. It is irritant to mucous membranes and causes a conjunctivitis. Inhalation may produce impairment of the upper airways and it may be hepatotoxic. Chronic exposure may result in general weakness, excessive fatigue, dizziness, headache, irritability, sleeplessness and impaired memory. Long-term skin contact causes drying and defatting of the skin which may lead to a dermatosis. Haematological effects include anaemia, poikilocytosis, anisocytosis and leukopenia (sometimes leucocytosis) with a relative lymphocytosis.
>
> ... trimethylbenzene is an aromatic hydrocarbon like xylene but less volatile. Its toxicological properties are similar to those of xylene and include irritation of the skin and mucous membranes. Following occupational exposure, nervousness, anxiety, bronchitis and a hypochromic anaemia have been observed."

3. From about 1985 the complainant showed several symptoms and in December 1985 she had to go into hospital. She had recurrent illnesses each year which required further examination and stays in hospital. After being examined by a medical expert, Dr. Hruby of the First Medical University Clinic of Vienna, she informed the Agency on 25 November 1987 that he suspected a causal link between her symptoms and her work. In 1987 the Agency told her to fill and empty vials in a fume hood in order to prevent the intake of vapours. In a report dated 4 October 1988 to the medical service of the Vienna International Centre, which covers the Agency, Dr. Hruby said about her case:

> "All the conditions point to chronic intoxication with solvents of the Toluol or Trimethylbenzol type as a result of her being exposed over a period of many years in her professional work. ... The essential requirement for a rapid improvement ... and to avoid continuing toxic damage is an immediate cessation to the professional exposure to the solvents."

The Agency thereupon took her off work with Picofluor.

4. On 15 February 1991 the complainant lodged with the Agency a claim to compensation for service-incurred disorders. At the Director of Personnel's request she developed her claim in a memorandum of 6 March. Her counsel sought from the Agency the cost of in-patient treatment and exact analysis of her disorders at the Medical University of South Carolina (MUSC) at Charleston, in the United States.

5. Dr. Jahn, a professor at the Clinic for Occupational Medicine of the University of Vienna, had her under examination

from 28 August to 23 September 1989 and saw her again on 13 April 1991. He wrote about her at length in a letter of 27 May 1991 to the Agency's acting chief medical officer, Dr. Edwards. He said:

> "In summary the complete case of Mrs. Kogelmann is not clear yet. There is evidence due to the investigation of the blood that the exposition was higher than the allowable value ... The chronic nervous disease, the liver disease and the complaints of her stomach can also be due to her chronic exposure. The question is that we could not find any links between trimethylbenzene and scleroderma in the literature at the moment ... To clear up the whole case it seems to be necessary that Mrs. Kogelmann has to contact the specialists in America. Even if the sclerotoma [sic] is not linked with the occupational situation, my opinion is that the nervous, specially the psychiatric situation of Mrs. Kogelmann, can be linked to the chronic exposure to organic solvents. For this reason also the neuropathy is another fact which confirms this hypothesis."

6. The Agency put the complainant's case to the Advisory Board on Compensation Claims, which met to discuss it on 6 June 1991. On its recommendation the Agency sent her at its expense to the MUSC to undergo tests. According to the Agency the purpose was to get final clarification of her case; but she says that it was just to determine whether she was suffering from scleroderma. Upon her discharge on 11 July 1991 Dr. LeRoy, who was director of the division of rheumatology and immunology at the MUSC, signed a "hospital discharge summary". Under the heading "Discharge diagnosis" he wrote:

> "(1) Atypical left-sided chest pain of undetermined etiology.
>
> (2) Minimally abnormal lung tissue by biopsy, of undetermined significance.
>
> (3) Abnormal EEG [electro-encephalogram] of unknown significance.
>
> (4) Anxiety.
>
> (5) No evidence of scleroderma."

7. According to the medical board's report scleroderma occurs in systemic sclerosis, which the board describes as follows:

> "Systemic sclerosis is a generalised connective tissue disorder characterised by fibrosis and degenerative

> changes in the skin (scleroderma), synovium, muscles and other organs especially the gastro-intestinal tract, lungs, heart and kidneys. [A named scientific study] concluded that the diagnosis of systemic sclerosis must be made from the presence of one major criterion (proximal scleroderma) and several minor criteria (sclerodactyly, digital pitting, fingertip scars or loss of digital fingerpad substance and bilateral basilar pulmonary fibrosis)."

8. In his discharge summary Dr. LeRoy went on:

> "She also had a skin biopsy approximately six months ago that was read as scleroderma, and therefore she was referred here for evaluation of her connective tissue disease ... The patient was admitted to the Rheumatology Service for work-up of her diagnosis of scleroderma. By history and physical examination, there was no evidence of scleroderma ... The patient ... had extreme anxiety although with the cultural and language barriers [the psychiatrist consulted] found it difficult to truly assess the pathologic extent of this anxiety. ... We find no evidence for the diagnosis of scleroderma. The other abnormalities stated, are unclear as to etiology ... The combination of mild cerebral, mild liver, and mild lung abnormalities do not fit into a known toxicologic diagnosis in our experience."

In a letter of 23 July 1991 to the Agency's chief medical officer Dr. LeRoy said: "Personally, I see no medical reason why she cannot continue her present employment."

9. What Dr. LeRoy did not say was that none of the abnormalities in the complainant's condition might have a toxic origin. His opinion related to the combination of her disorders, not to the possibly toxic origin of any one or more of them. Yet what Dr. Jahn had said in his letter of 27 May 1991 was that, even if the scleroderma proved not to be a service-incurred disorder, the complainant's other symptoms might be due to her chronic exposure to toxic substances.

10. The Advisory Board on Compensation Claims met again on 26 September 1991 to reconsider her case in the light of Dr. LeRoy's opinion. According to the "summary record" of that meeting it "agreed that there was no conclusive evidence that Mrs. Kogelmann's ailments were attributable to the performance of her official duties". By a memorandum of 7 October 1991 the secretary of the Board informed her of that opinion and said that on 2 October the Director General had, on the Board's recommendation, accordingly dismissed her claim as set out in her memorandum of 6 March 1991.

11. By a letter of 4 November 1991 to the Director-General the complainant's counsel applied for reconsideration of the decision under Article 40 of Appendix D to the Staff Rules and for the establishment of a medical board of arbitration under Article 41 to consider the medical aspects of the case. Appendix D contains the rules governing compensation in the event of death, injury or illness attributable to the performance of official duties. The Advisory Board thereupon established the medical board and it was composed of the Agency's nominee, Dr. Edwards, the complainant's, who was Dr. Hruby, and Dr. Blain, a third doctor co-opted by the first two, who served as chairman.

12. The medical board met on 12 December 1991 and its report is dated "January 1992". Under the heading "Background" it states that the Agency "required arbitration on the medical evidence that [the complainant] had been exposed to excessive amounts of solvents during her work and this had contributed to the development of clinical signs of systemic sclerosis". It then considered two questions, which it stated in the following terms:

> "1. Was Frau Kogelmann exposed to solvents at a level likely to cause ill-health[?]
>
> 2. Was there clinical evidence that she was suffering from systemic sclerosis[?]"

13. It is plain on the evidence that Dr. Blain and Dr. Edwards held a preliminary meeting without Dr. Hruby and together inspected the laboratory premises on which the complainant had been working from 1979 onwards. In fact Dr. Hruby took no active part in the board's enquiry into the levels of the complainant's exposure. When the three members of the board did meet, Mr. Stichler, an official of Physical and Chemical Sciences (RIPC) in the Department of Research and Isotopes, simply told them what in the Agency's view the levels of the complainant's exposure had been: they were not told that in a letter she had written on 12 December 1988 to the acting Director of Personnel the complainant had estimated the levels of her exposure to be much higher than the Agency's figures.

14. The determination of the level or levels of exposure that the complainant suffered is not a medical question but one that called for consideration of scientific evidence, and one of which no member of the medical board had any expert knowledge. Dr. Hruby is not to be blamed for failing to protest on the complainant's behalf against the findings by the other two doctors as to levels of exposure. Even though Dr. Hruby acquiesced in the board's findings the complainant should not be damnified on that account: the terms of reference of

Dr. Hruby and of the other two doctors were to come to conclusions on the medical aspects of the case.

15. Under the heading "Conclusion on exposure" the board's report says:

> "The Medical Board of Arbitration agreed that there was evidence that she had had long-term low level exposure, probably for a period of about two hours and at a frequency of twice per week, to xylene and most recently to trimethylbenzene."

But in the absence of agreement between the parties on the levels of the complainant's exposure the medical board was wrong to answer the first question set out in 12 above. First, it was informed of only the Agency's side of the case. Secondly, it based its findings only on the practice followed in 1986. Its report does refer to an experiment that Agency staff carried out in 1987 "to estimate the maximum air concentration" for what it calls a "worst-case situation" involving the use of both trimethylbenzene and xylene. But the complainant had no part in that experiment; and the "worst-case situation" was based on the maximum number of samples prepared in 1986 and on the assumption of exposure for a period of two or three hours at a time, whereas the complainant alleges exposure for far longer periods - of up to ten hours a week - while experiments were going on. Thirdly, there should not have been inspection of the laboratory premises by only two members of the board: the gathering of any evidence was the responsibility of all three.

16. Under the heading "Overall conclusions" the board's report reads:

> "1. The Medical Board accepts that Frau Kogelmann has had long-term potential exposure to the volatile solvent xylene and, more recently, trimethylbenzene but any exposure has been infrequent, at low concentration and of short duration during the working week.
>
> 2. The Medical Board did not see any conclusive documented evidence that Frau Kogelmann suffers from systemic sclerosis."

As was said in 14 above, the first of those findings was not a matter for medical experts to determine and rested, besides, on incomplete and possibly incorrect information. The board based the second of its findings on the lack of "conclusive" evidence. But that was not the standard of proof it was required to apply. Even in criminal cases the law does not require conclusive proof. Judgment 528 (in re Bastari) referred under 4 to the requirement of "positive proof", and

Judgment 641 (in re Farah) said under 8 that there must be a "causal link in the legal sense, that is to say, some fairly definite connection between the cause and the effect". Such language is not to be taken to require more than a balance of probability in favour of what the complainant is alleging. I other words, if on the evidence taken as a whole it seems more likely than not that some or all of the complainant's symptoms were caused by exposure to toxic solvents she will have discharged the onus of proof. The medical board was wrong in thinking that conclusive evidence was required in any aspect o its enquiry.

17. Under the heading "Supplementary conclusions" the board said further:

> "i) There is no documented evidence that she has functional impairment of either central or peripheral nervous systems as a result of exposure to xylene or trimethylbenzene.
>
> ii) There is no conclusive evidence that she has impairment of pulmonary function or pathological changes in her lungs as a result of long-term exposure to volatile solvents.
>
> iii) There is laboratory evidence that she has had a mild recurring hepatic dysfunction although the abnormal parameters have been improving over the last 3-4 years ... A recent liver biopsy is essentially normal."

Finding i) is objectionable because it depends on the level of exposure that the board determined. Besides, it is incorrect to state there is "no documented evidence" of functional impai ment of the nervous systems as a result of exposure. Dr. Jahr for one, gave his opinion, which is referred to in 5 above, that there was such impairment. Finding ii) is objectionable because it again depends on the degree of exposure determined by the board and because the board again mistook the standard of proof by requiring "conclusive evidence". As for finding iii), the board offers no opinion about the origin of the "hepatic dysfunction".

18. What the medical board should have provided was an opinion based on the balance of probability as to which, if any, of the complainant's symptoms might have been caused by her exposure to toxic substances. Since its members were neither in a position nor, for that matter, qualified to determine the actual levels of her exposure or even the levels obtaining in the "worst-case situation", they should have confined their opinion to what in the abstract would have been a safe level, thereby leaving others to determine the probable level by a method allowing both sides to participate.

19. The Advisory Board on Compensation Claims met again on 4 February 1992 to reconsider the case in the light of the medical board's report. According to the record of that further meeting it recommended that the Director General uphold his previous decision. In a letter of 27 March 1992 to the complainant the chairman of the Advisory Board informed her that the Director General had done so, and she appealed eventually, on 15 July 1992, to the Joint Appeals Board. She also lodged appeals on 14 and 26 August 1992 on the matters that form the subject of her second and third complaints. In its report of 16 November 1992 on her three appeals the Joint Appeals Board held, as to the first and main appeal, that "the Agency had taken all reasonable measures to ascertain the levels of her exposure, and that the impact of both estimated actual and 'worst case' exposure levels had been evaluated". It concluded that "the Agency's evidentiary inquiry had been thorough and proper".

20. This last conclusion by the Joint Appeals Board was plainly wrong for the reasons already stated in 16 to 18 above with reference to the medical board's findings. Since those findings and the Joint Appeals Board's report were flawed for the same reasons, the final, impugned, decision of 22 December 1992 that the Director General based thereon suffers from the same flaws and must be set aside.

21. In this judgment, which is an interlocutory order, the Tribunal will follow the precedent it set in Judgment 875 (in re Muiga). It orders two expert inquiries. It will appoint both a scientific expert and a medical expert, and their terms of reference will be as set out in the operative points of the decision below. Before the inquiries the parties may submit observations which the Registrar will forward to each of the experts, the time limits for filing to be set by the President. Each party may answer the other's observations.

22. The second and third complaints are about the withdrawal of the complainant's sick leave, her fitness for work and her pay status. Her fourth complaint is about the withholding of benefits under the Agency's Temporary Disability Insurance Plan pending the determination of her sick leave status and fitness for work. Such questions are all to some extent bound up with the determination of the facts material to her first complaint. It is, however, desirable that the medical expert give his opinion as to whether she was fit to return to work at any time in 1992 or 1993 and in particular by the date at which her sick leave expired, namely 17 April 1992.

23. In reply to the application of 1 September 1993 by the complainant's counsel for the production of documents the defendant submitted on 13 October 1993, among other things, "a list of all documents produced by the Agency to the medical

board and Professor Blain". Counsel has sent the Tribunal a further application dated 12 November 1993 contending:

1. that the list of documents gives the total as 381 whereas the actual number is only 124;
2. that it fails to identify some documents unambiguously by the description given:
3. that it includes items that were not appended to the Agency's reply; and
4. that it does not distinguish between documents submitted to the medical board and documents put to Dr. Blain.

By a letter of 2 December 1993 the Registrar told counsel that the Tribunal invited him to incorporate his application of 12 November 1993 in the rejoinder he had yet to file. He did not do so. The Tribunal cannot rule on the matter until the Agency has had an opportunity to reply, though it may be observed that it is no longer relevant to distinguish between the items before the medical board and the items put to Dr. Blain. The Agency shall be granted thirty days from the date of receipt in which to comment on the complainant's application. If it has no objection to complying with what sh asks there will be no need for the Tribunal to revert to the matter. If it does, she will have thirty days in which to comment on the Agency's reply and the Tribunal will rule on th matter later.

24. The Tribunal adjourns consideration of the other issues raised in the four complaints.

DECISION:

For the above reasons,

1. The Director General's decision of 22 December 1992 is se aside.
2. A scientific expert, to be appointed by order of the President of the Tribunal:
    (a) shall carry out an investigation to determine the probable levels of exposure of the complainant to xylene and trimethylbenzene;
    (b) shall distinguish between different periods and different toxic substances and, where the evidence

conflicts, between the probable levels according to the complainant and the probable levels according to the defendant;

(c) may comment on the relative weight to be given to conflicting evidence;

(d) shall take into account the pleadings and documents on levels of exposure and any further briefs that the parties may submit as provided for in 21 above;

(e) shall inspect the laboratory premises, if necessary in the presence of both parties, and take such further additional evidence as either party may adduce.

3. The scientific expert shall submit a report, to be sent to the Registrar in eight copies not more than ninety days from the date of receipt of the pleadings, the documents and any further briefs submitted by the parties.

4. Copies of the scientific expert's report shall be communicated to the medical expert and to each of the parties.

5. A medical expert, to be appointed by order of the President, shall carry out a clinical and psychological examination of the complainant to determine:

(a) the nature and extent of any physical and psychological disorders from which the complainant is suffering or was suffering at the material time;

(b) on the balance of probability whether any of those disorders was attributable to her long-term exposure to xylene or her exposure for nearly three years to trimethylbenzene at the level or levels determined by the scientific expert;

(c) to what extent, if any, her work capacity was impaired by disorders wholly or partly attributable to her exposure to toxic substances;

(d) whether she was fit to return to work on the expiry of her sick leave on 17 April 1992 or indeed at any time in 1992 or 1993;

(e) where in the medical expert's opinion some disorder is not wholly or partly attributable to her exposure to toxic substances, identify as far as possible other probable causative factors.

6. The medical expert shall take into account the pleadings, the medical evidence on the case, the scientific expert's report and any further briefs that the parties may submit as provided for in 21 above and shall examine the complainant in consultation with any specialist or specialists of the medical expert's choosing whose assistance seems necessary and with the services of an interpreter, again if necessary.

7. The medical expert shall submit a report, to be sent to the Registrar in seven copies not more than ninety days from the date of receipt of the pleadings, the medical records, the scientific expert's report and any further briefs submitted by the parties.

8. Copies of the medical expert's report shall be communicated to each of the parties.

9. The Agency shall pay the fees and expenses of the scientific and medical experts, the amounts to be approved by the President of the Tribunal.

10. The Agency shall pay any expenses the complainant may incur, to be approved by the President failing agreement between the parties, for the purpose of the expert inquiries.

11. All other issues arising out of the first complaint and the complainant's other three pending complaints are adjourned.

12. The Agency shall pay the complainant 10,000 Swiss francs to cover costs incurred to date for her first complaint.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSIÓN

In re GONZALEZ, LARRANAGA,
MANZANELLI, RUGERONI and TRENCHI

Judgment 1374

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr. Carlos Hector González, Mr. Carlos Norberto Larrañaga, Miss Maria Rosa Manzanelli, Mr. Miguel Rugeroni and Mr. Arnaldo Trenchi against the Pan American Health Organization (PAHO) on 10 November 1992 and corrected on 25 November 1992, the PAHO's reply filed on 25 April 1993, the complainants' rejoinder of 15 April and the Organization's surrejoinder of 29 May 1993;

Considering the applications to intervene filed by;

M. Arbor
G. Areitio
J.C. Areitio
I. Arenas
G. Becco
N. Bezenzette
L. Bulgarini
W. Caputti
M. Farioli
R. García
C. Graziano
A. Gutierrez
L. Lázaro

A.M. Loisi
N. Lucero
A. Martínez
M. Molina
M. Montanelli
A. Nebel
N. Perdomo
J. Pettinati
L. Pollizo
W. Smid
E. Soler
A. Tau

Considering Article II, paragraph 5, of the Statute of the Tribunal, PAHO Staff Regulation 9.2, Staff Rules 1040 and 1050 and paragraphs II.9.250 to 375 of the Manual of the World Health Organization as applicable to PAHO staff;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Staff Rules 1050.2 to .4 of the Pan American Health Organization read as follows:

"1050.2 When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director, based upon the following principles:

1050.2.1 competition for retention shall be limited to staff holding relevant posts at the same grade as the post to be abolished, or one grade lower;

1050.2.2 if the post is in the professional category and above, competition shall extend to all offices; if the post is subject to local recruitment, competition shall be limited to the locality in which the post is to be abolished;

1050.2.3 staff members holding career-service appointments shall be given priority for retention. The Director may establish priorities among the temporary staff;

1050.2.4 within any priority group, preference for retention shall be based first upon performance, and, when this is not decisive, upon seniority of service;

1050.2.5 a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible.

1050.3 Termination under this rule shall require the giving of at least three months' notice to a staff member holding a career-service appointment or a confirmed fixed-term appointment of one year or more and at least one month's notice to any other staff member.

1050.4 A staff member whose appointment is terminated under this Rule shall be paid an indemnity ..."

More detailed rules on the reduction-in-force procedure are set out in the Manual of the World Health Organization as it applies to the PAHO, the material paragraphs being II.9.250 to 375.

The complainants all joined the staff of the PAHO in the General Service category between 1968 and 1977. They held two-year appointments at first and had them regularly extended. The last extension granted to all of them but Mr. González was to expire at 31 December 1990; his was to expire at 31 August 1991. They served in the PAHO's Pan American Zoonoses Center, known as CEPANZO. The Center was set up in 1956 under an agreement with the Government of the host country, Argentina, to help member States in checking the transmittal of disease from animals to human beings. Its headquarters were at Azúl, which was Mr. González's duty station, and it had a field station at Martínez, where the other complainants were assigned.

The 1956 agreement split the costs of running the Center between the Organization and the Government of Argentina, which was to pay, among other things, the salaries of most of the staff. Clause VII(2) of the agreement allowed either party to terminate it on the last day of any year following one in which that party had given the other written notice of termination.

In 1982 the Government began to fall behind in its contributions to the Center. By 1985 it was over 90,000 United States dollars in arrears. In 1986 the national press reported that the Center was carrying out potentially hazardous tests of a vaccine against rabies without leave from the competent Government authorities. In the same year the Government's arrears soared to $750,000 and by November 1989 they were over $4 million.

By fax messages of 27 September 1990 the Chief of Personnel of the PAHO gave each of the complainants notice of termination as from 31 December 1990 under Staff Rule 1050 on abolition of post and reduction in force; he said that the decision was due entirely to the Center's financial plight.

In a letter of 30 October the Chief of Personnel asked the president of the Staff Association to name two staff representatives and two alternates to sit on a committee being set up under the reduction-in-force procedure provided for in the Staff Rules; he also consulted the president about the chairing of the committee. In a memorandum of 6 November the president asked the Chief of Personnel to say, in light of the negotiations going on with the Government, which posts if any were to be abolished and whether the reduction-in-force procedure was necessary.

In a letter of 7 November the Chief of Personnel answered that the reduction-in-force procedure would have to go ahead but that if ample funds became available the Organization would "cancel all termination notices already given". On 14 November he provided a list of 42 posts to be abolished, the complainants' among them. The president informed him in a memorandum of 20 November of the Staff Association's nominee for chairing the committee and of its appointment of two regular and two alternate staff representatives.

On 21 November 1990 the complainants lodged appeals with the Headquarters Board of Appeal at Washington.

In December 1990 the Council of the Staff Association had adopted a plan to save jobs through voluntary surrender of up to a fifth of salary. Mr. González, Mrs. Manzanelli and Mr. Trenchi signed affidavits pledging such contributions and on 6 December the president passed the texts on to the Director of the Center. In a letter to the president of 14 December the Chief of Personnel rejected the plan on the Director's behalf on the grounds that it was at odds with the Staff Regulations and Staff Rules.

By fax messages of 21 December 1990 the Chief of Personnel told each of the complainants that because the Government had promised to make a payment early in 1991 their posts and appointments were being extended by three months but the notice of termination held good. On 26 December the Chief of Personnel extended their appointments to 30 April 1991, the extension again being without effect on notice.

In a memorandum of 27 December 1990 the Chief of Personnel divided the posts to be abolished into two groups and asked the chairman of the reduction-in-force committee to carry out a separate procedure for each list; he said he wanted the committee to report on the first group of posts "related to non-priority programs in CEPANZO" by 31 January 1991. Three of the complainants' posts were marked for "priority reduction".

In a telex of 24 January 1991 the president of the Staff Association asked the chairman of the committee to put off a meeting scheduled for 30 January until 4 February or later so that both the regular staff representatives could attend. But the committee met on 30 January anyway, and the alternate staff representatives replaced them.

In memoranda dated 1 February 1991 the complainants challenged the lawfulness of the extensions notified on 26 December 1990: Mr. González observed that he already had an extension to 31 August 1991 and the others inferred tacit renewal until 31 December 1992 from what they saw as the unlawful notice of termination given on 27 September 1990. In replies dated 13 February 1991 the Chief of Personnel doubted whether their contracts could be honoured after 30 April unless the Government made over the funds.

In a memorandum of 13 February to the chairman of the reduction-in-force committee the president of the Staff Association asked the chairman to let a regular representative take part in the committee's work in keeping with Manual provision II.9.320. On 21 February the chairman refused so as "to avoid further delays".

On 5 March 1991 the committee sent the Director of the Organization its report, which no staff representatives had signed. It recommended terminating all General Service category staff at the Center but four, who could go to the office of the Organization's representative at Buenos Aires. In letters of 27 March to each of the complainants the Chief of Personnel confirmed termination under Staff Rules 1040 and 1050 at 30 April 1991.

On 30 April - the complainants' very last day of work - the Government of Argentina made a payment of $1.5 million and on 10 May another of the same amount.

On 27 September 1991 the Directing Council of the PAHO founded the Pan American Institute for Food Protection and Zoonoses, known by the initials of its title in Spanish as INPPAZ. The Institute moved into CEPANZO's old premises.

The Headquarters Board of Appeal reported to the Director on 15 June 1992 on the complainants' appeals. One member commented that the records of the reduction-in-force committee's debate had been destroyed. The Board's unanimous recommendation was that the complainants should get preference for "national contract posts" at INPPAZ. Three of its members made no other recommendations because of the "complexity of the case" and the "lack of clarity" of the issues; the other two recommended rejecting the appeals.

In letters of 11 August 1992 the Director informed each of the complainants that he endorsed the Board's recommendation about filling "national contract posts" and the recommendation from the two Board members who had favoured rejection. Those are the decisions impugned.

B. The complainants submit that the abolition of their posts and the termination of their appointments were unlawful.

Though the reason given for abolition was lack of funds such grounds no longer held good by December 1990, when the Staff Association came up with a sound plan for cutting the Center's running costs and became even less plausible in April and May 1991, when the Government of Argentina made over $3 million. So the decisions overlook essential facts. What is more, they show bad faith since the real reason for abolition of the posts was a wish to bring in cheaper "national contract staff" for INPPAZ.

The abolition being unlawful, so too were the terminations it entailed.

The terminations show procedural flaws as well. The complainants cite several defects in the reduction-in-force procedure, including breach of Rule 1050.2.4 on the criteria for retention and breach of WHO Manual paragraph II.9.320 on the composition of the committee. According to 1050.2.4 performance should be given priority over seniority, but the committee ignored it. By preventing a regular staff representative from taking part it overstepped its authority. The complainants see no basis in the rules for taking posts in two batches. They charge the Organization with preventing them from competing for two posts it planned to create in May 1991.

As the Tribunal held in Judgment 1045 (in re Mitastein) the rules "preclude termination of an appointment until the reduction-in-force procedure has been completed". So the notice the complainants were given on 27 September 1990 of simultaneous abolition and termination was invalid. For want of proper notice they infer extension of their contracts by two years.

They seek reinstatement as from 1 May 1991 or, failing that, a negotiated settlement "with each complainant equivalent to salary and allowances through age 60 plus the difference in pension through age 60 for having had one's career cut short". They ask the Tribunal to "recommend" that the calculation of pay for each period be made in United States dollars at the prevailing rates of exchange, the total amounts to be converted back into local currency at the rate prevailing at the date of payment. They claim moral damages in an amount equivalent to three times the monthly salary and allowances "that would be due" to them at the date of payment and costs amounting to one-third of the total amount paid to each of them.

C. In its reply the PAHO submits that the abolition of the complainants' posts and termination of their appointments were lawful and responsible. Regulation 9.2 empowers the Director to terminate an appointment "if the necessities of the service require abolition of the post" and he did so in this case only after taking all possible action to avoid closing down the Center.

Though some staff were willing to forgo a fifth of salary to save the Center their offer was unrealistic: it was neither enough to make up the deficit nor consistent with long-standing aspirations for higher pay. Even when the Government did pay, in April and May 1991, the money served only to cover the debts of CEPANZO and the costs of winding it up.

The PAHO denies that INPPAZ was set up to save money on pay while pursuing the same aims: CEPANZO was "totally different" from INPPAZ and zoonoses were not a prime concern of the new Institute.

As to the reduction-in-force procedure the Organization complied with the material provisions in 1050. It could not offer the complainants other posts in Argentina as there was none. Nor was it easy to find suitable positions for staff like them with highly specialised laboratory experience. The dispute over the composition of the reduction-in-force committee was unnecessary and made its job the more difficult. In giving the committee two lists of posts the Organization was merely seeking to simplify its work and there was nothing wrong with that. The posts it created in May 1991 had nothing to do with the reduction-in-force procedure started in October 1990.

The financial crisis made notices of termination essential. There is no parallel to be drawn between the complainants' case and the one ruled on in Judgment 1045.

The complainants' inference of extension of their appointments by two years is "far-fetched": CEPANZO no longer exists, there are no suitable posts elsewhere and they have already accepted terminal indemnities.

The reduction-in-force procedure caused them no moral injury.

D. In their rejoinder the complainants seek to refute the PAHO's pleas in the reply. They trace the financial crisis back to 1986, when the PAHO prompted a "huge scandal" by agreeing to a dangerous experiment without seeking the Government's approval even though such experiments were banned in Europe and the United States. The financial crisis was not inevitable.

The staff contributions would have greatly lowered the Center's operating costs, of which salaries were the lion's share. But with INPPAZ in mind the PAHO rejected the plan out of hand. On its own admission the Institute was to carry on CEPANZO's work: INPPAZ was just a cheaper re-embodiment of CEPANZO.

E. In its surrejoinder the Organization disputes the complainants' arguments in the rejoinder and deplores their cavalier attitude to CEPANZO's financial plight. Allusions to events long past, it submits, are a ruse to divert attention from the severity of the crisis. INPPAZ was concerned with wider issues of food protection, not just the transmittal of disease from animals to people.

CONSIDERATIONS:

1. The Pan American Zoonoses Center (CEPANZO) was set up in 1956 under an agreement between the Pan American Health Organization and the Government of Argentina to give technical assistance to the countries of the Americas in checking zoonoses, i.e. diseases that can pass from animals to man. The agreement said that the Organization should provide managerial staff, certain facilities, and grants for study and training; the Government was to supply the premises and funds to cover maintenance, utilities and the salaries of other staff. In the later years the Government was financing some 45 per cent of the Center's budget.

2. From 1982 the Government was in arrears with its contributions and by 1989 it owed the Center over $4.2 million. After lengthy negotiation the Directing Council of the PAHO authorised the Director to take by 31 December 1990 the legal and administrative action required to give effect to clause VII(2) of the 1956 agreement, which empowered either party to terminate it on the last day of any year following one in which it had given written notice of termination to the other. On 26 December 1990 the Director gave the Government notice that the agreement would end at 31 December 1991.

3. The five complainants and the 25 intervenors used to belong to the General Service category of staff of CEPANZO and they held fixed-term appointments. On 27 September 1990 the Organization served each of them written notice that their appointment would terminate at 31 December 1990. The notice promised separate correspondence about the abolition of each of their posts under Staff Rule 1050, which is about abolition of post and reduction in force and of which the material provisions are reproduced in A above.

4. On 30 October 1990 the Chief of Personnel wrote to the president of the Staff Association about setting up a reduction-in-force committee, asking him to name staff representatives to it and to state a preference for chairman. The president observed in his reply of 6 November that negotiations with the Government were still in progress and that he had not yet received a list of the posts to be abolished. Although the Chief of Personnel had stated in his letter that the reduction-in-force procedure would go ahead in the first fortnight of November, not until 26 November was the committee constituted. In its report, submitted on 5 March 1991 to the Director of the Organization, it recommended transferring four members of the support staff of CEPANZO to the PAHO representative's office in Argentina but terminating the complainants' appointments.

The notices of termination
of 27 September 1990

5. On 21 November 1990 - before the committee had been set up - the complainants filed internal appeals with the Headquarters Board of Appeal of the PAHO, in Washington, challenging the notices of 27 September 1990 on the grounds that "reduction in force has not taken place". They put forward the same plea in the present complaint.

6. The plea is upheld. The PAHO purported on 27 September 1990 to terminate the appointments of holders of posts that were to be abolished. Only then did it follow the prescribed reduction-in-force procedure to determine which staff members, if any, would be kept on and have their contracts renewed. As the Chief of Personnel wrote on 7 November 1990:

> "Needless to say that we will be agreeable to cancel all termination notices already given, including reduction-in-force arrangements, if funds are made available, to obviate the need for the reduction of posts and staff in the Center."

That approach offended against the material provisions of the Staff Rules on reduction in force. As was said in Judgment 469 (in re O'Connell) under 7, "the abolition of a post does not automatically terminate the holder's appointment". Judgment 1045 (in re Mitastein), which was also explicit on that score, said in 3: "the Rules preclude the termination of an appointment until the reduction-in-force procedure has been completed". In other words, the procedure must be followed before, not after, notice of termination is given. In line with the Rules and the case law, therefore, the notices of termination served on the complainants on 27 September 1990 were premature and so unlawful and without effect. For that reason and in accordance with the case law, of which Judgment 1045 again affords an example, their contracts must be deemed to have been extended by implication.

The reduction-in-force procedure

7. The complainants further contend that the reduction-in-force procedure was flawed in several respects.

8. By a memorandum of 27 December 1990 the Chief of Personnel sent the chairman of the reduction-in-force committee a list of staff members at CEPANZO whose posts were "related to non-priority programmes" and therefore called for "definite and

priority reduction". He asked the committee to take up that list first and report by 31 January 1991. He suggested that it might consider in February 1991 a second list comprising the other staff and report on them later.

9. The Tribunal holds that there was no authority for proceeding in that way. Indeed the Administration pleads none: it merely says that the two lists were intended "to facilitate and to rationalize the work of the [reduction-in-force] Committee". The rules on reduction in force in the Manual - in particular paragraph II.9.340 - do say that "candidate[s] for retention" are to be "placed in different priority groups". But the criteria for determining priority relate to "the type of their appointment" and to "the total number of years they have served or are deemed to have served", not to the priority of the programmes in which they have been engaged. The PAHO's applying the wrong criteria to determine the "priority groups" flaws the reduction-in-force procedure because it means that the staff whose posts had been abolished were not put in the order of priority prescribed in the Manual for retention.

10. The Headquarters Board of Appeal unanimously recommended giving the complainants preference in filling "national contract posts" at the new Institute. Though a minority of two further recommended refusing the redress sought, the majority of three declined to make any other recommendations; they said that "in view of the complexity of the case, and ... lack of clarity concerning Regional Center staff policy versus national agreements governing the structure and functioning of Centers which have activities of international scope, they prefer[red] only to raise the issues that derive from the findings and conclusions". Letters of 11 August 1992 from the Director - the decisions now impugned - denied the remedies that the complainants had sought although he did endorse the recommendation for giving them preference for posts at INPPAZ.

The notices of termination of 27 March 1991

11. Rule 1050.3 requires that holders of confirmed fixed-term appointments of one year or more should be given at least three months' notice of termination. The complainants held such fixed-term appointments. The letters dated 27 March 1991, sent to each of them for the purpose of confirming the termination of their appointments, did not in fact constitute confirmation at all since the notices that they had been sent on 27 September 1990 were, for the reasons set out in 6 above, unlawful. Even if the reduction-in-force procedure had been

properly carried out the letters of 27 March 1991 did not give valid notice of termination. They gave the complainants only just over one month's notice, to 30 April 1991, not the three months to which they were entitled under Rule 1050.3. For that reason too the complainants' contracts must be deemed to have been extended by implication.

The relief

12. Because of the foregoing flaws alone, and there being no need to entertain the complainants' other pleas, the impugned decisions of 11 August 1992 by the Director must be set aside and the complainants are entitled to the following relief.

(1) The reduction-in-force procedure must be carried out anew and applied to each of the complainants.

(2) Since they have never received valid notices of termination their contracts of appointment are deemed to have been extended and to remain in force. On that account they are entitled to payment from the Organization of salary, allowances and any other benefits due under those contracts as well as of interest thereon to be reckoned at the rate of 10 per cent a year as from the dates at which each amount fell due. The Organization may, however, deduct from the totals thus reckoned any termination indemnities or occupational earnings they may have received since 1 May 1991.

As to the "recommendation" which they seek from the Tribunal in the complaint forms as to the rates of exchange to be applied in reckoning the sums due, and which they do not seek to justify, that is not a formal claim which the Tribunal will entertain.

13. CEPANZO having been closed down in the circumstances described above, no question of moral injury to the complainants can arise and the complainants' claims to damages under that head are therefore disallowed.

14. Their claims to awards of costs in amounts equivalent to one-third of the total amounts due to them are also misconceived. Costs are awarded against legal fees and other expenses incurred in litigation. Though the Tribunal will make awards under this head, the complainants are entitled to no more than 500 United States dollars each.

15. The applications to intervene are allowed, and the interveners are entitled to the same relief as the complainants, save in the matter of costs, insofar as they are in the same position in law and in fact.

DECISION:

For the above reasons,

1. The Director's decisions of 11 August 1992 are quashed.
2. The complainants are reinstated as from the date of separation from service.
3. The PAHO shall make to each of them payments to be reckoned as set out in 12 above.
4. The cases are sent back to the Organization so that it may carry out anew the reduction-in-force procedure as prescribed in the material rules.
5. The Organization shall pay each of the complainants 500 dollars in costs.
6. Their other claims are dismissed.
7. The applications to intervene are allowed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

José Maria Ruda

William Douglas

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

GANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re MANGEOT (No. 3) Judgment 1375

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Bernard Mangeot against the European Organization for Nuclear Research (CERN) on 30 June 1993, CERN's reply of 17 September, the complainant's rejoinder of 2 November 1993 and the Organization's surrejoinder of 17 January 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Chapter II, Section 2, and Regulation R VI 1.11 of the CERN Staff Rules and Regulations and administrative circulars 10 and 26;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at CERN is summed up under A in Judgments 1184 on his first complaint and 1290 on his second. In the first one he was challenging the Organization's refusal either of an indefinite appointment or of renewal of his fixed-term contract, and he succeeded. CERN thereupon granted him a seven-month extension to 28 February 1993, but since the Director-General refused further extension on its expiry he filed the second complaint. The Tribunal dismissed it in part. At the time of this dispute he was on "career path" V at grade 7, step 3.

Annual step increases are governed by Chapter II, Section 2, of the Staff Rules and Regulations and by administrative circular 26, which is entitled "Annual Interview, Advancement and Change of Career Path". Such an increase is granted on the strength of a written assessment of performance and an annual interview with the first-level supervisor, which ordinarily takes place by 31 March. The results of the procedure, which brings in both the staff member's division and the Personnel Division, are recorded in a form headed "Annual Interview and Advancement", which forms the basis of the Director-General's final decision.

In March and April 1992 the complainant was on leave of one kind or another and seldom at work. In a note of 4 May 1992 his group leader described his performance as unsatisfactory and recommended withholding the annual step increase he might have had. In an "Annual Interview and Advancement" form dated 15 May his supervisors said that since he had been often absent it had proved impossible to hold the annual interview and, with the agreement of the Leader of the Personnel Division, were recommending refusal of the increase.

By a letter of 29 June 1992 the Director of Administration notified the refusal to the complainant and by a letter of 27 August 1992 the complainant informed the Director-General that he was appealing against the decision.

By a letter of 26 February 1993 he asked his first-level supervisor for a copy of a memorandum the supervisor had written on 31 May 1991 assessing his performance as satisfactory. The supervisor refused in a letter of 5 March 1993 on the grounds that the memorandum was confidential. In a letter of 17 March to the Director-General the complainant again asked for the text and applied for referral to the Joint Advisory Appeals Board.

In a report of 8 March 1993 the Board recommended that the Director-General uphold the decision of 29 June 1992, but in a further report of 1 July 1993 recommended putting the text of the memorandum of 31 May 1991 in the complainant's file.

By a letter of 2 April 1993 - the impugned decision - the Director of Administration informed the complainant of the Director-General's decision not to grant the step increase and by a letter of 6 August 1993 sent him a copy of the memorandum of 31 May 1991 saying it would be put in his personal file.

B. The complainant contends first that the decision of 2 April 1993 was unlawful.

Under Regulation R VI 1.11 only the Director-General is authorised to take and notify decisions. Moreover, in a memorandum of 17 February 1992 setting the conditions for the delegation of his authority he rules out such delegation in the event of appeal against a decision by the Director of Administration. It was against just such a decision that the complainant lodged his internal appeal; so the letter of 2 April, being signed not by the Director-General but by the Director of Administration, was sent without authority.

In the complainant's submission the impugned decision also shows a mistake of law. In its report of 8 March 1993 the Joint Advisory Appeals Board said that although the complainant had been absent in March 1992 his division could still have "planned the annual interview"; that the decision of 29 June "rests on an item of evidence that was not appended to the interview form and which the complainant seems not to have had any knowledge of"; and that the Administration should "apply the rules more scrupulously". By discounting those remarks the Director-General overlooked essential facts.

The complainant utterly rejects the criticisms of his performance and submits that the Board failed to act impartially and so seriously infringed his rights.

The decision of 29 June 1992, too, was unlawful, and the one of 2 April 1993 confirmed it.

Citing the Board's report of 8 March 1993, the complainant submits that denying him the annual interview provided for in circular 26 was in breach of due process. That he was on leave did not warrant refusal of the step increase.

Nor did the Organization observe his right to a hearing. Although Annex I, point 1.2, of circular 26 says that "the performance of staff unavailable during the period of performance is appraised during their absence", his supervisors failed to fill up point 2a of the "Annual Interview and Evaluation" form and so deprived him of his right of reply.

The procedure shows several flaws. In particular it has no basis in any text the complainant is aware of.

The reasons for the decision of 29 June 1992 have not been stated.

Thirdly, the complainant submits that the two decisions he challenges overlooked essential facts. On 8 January 1991, when the increase was being considered, he had his appointment renewed for one year on the strength of a good performance report of 20 December 1990 from his group leader. Furthermore, administrative circular 10, which is about the "Personal Administrative File", says that supervisors' assessments are to be entered. By refusing to let him have the memorandum of 31 May 1991 in good time CERN was seriously at fault. Moreover, on 30 August 1991 his deputy group leader wrote another "glowing" appraisal of his performance.

He asks the Tribunal to quash the decisions of 2 April 1993 and 29 June 1992 and to order the Organization to grant him an annual step increase as from 1 July 1992, produce the performance appraisal of 31 May 1991 and pay him fair sums in material and moral damages and interest on the amounts due. He also seeks costs.

C. In its reply the Organization submits that the decision of 2 April 1993 did come from the Director-General and that all the Director of Administration did was pass it on to the complainant.

The decision shows no mistake of law. The complainant's division was the only one that had authority to set the date of an interview with him and rightly came to the view that he could not have the interview with his first-level supervisor in time. He has no right to see all the evidence relating to the procedure. Though staff do have the right to a hearing when their work is being assessed, the final decision to grant an annual step increase is at the supervisors' discretion.

The Organization made no mistake of fact in assessing him: in line with the rules it was his group leader who wrote the appraisal after looking at his file and consulting other members of the division.

His allegation that the decision of 29 June 1992 was unlawful is also unfounded.

CERN did state the reasons for the decision: they are set out in part 3 of the "Annual Interview and Advancement" form and are based on unfavourable assessments by the division as a whole, which run counter to his first-level supervisor's appraisal of 30 August 1991.

He may not rely on the assessment of 20 December 1990 since the period that counts for the step increase did not start until July 1991.

His application for disclosure of his first-level supervisor's memorandum of 31 May 1991 is irreceivable because there is no final decision on the matter. In any case, even though the memorandum does not cover the right period, the Organization has let him have the text.

D. In his rejoinder the complainant presses his pleas. He contends that the fact that there was no interview, for which he is not to blame, prevented him from having his say and so caused him serious injury.

He again submits that the author of the decision of 29 June 1992 acted ultra vires: the Organization offers no evidence of any exception to what the Director-General's memorandum of 17 February 1992 says.

CERN did overlook essential facts. He was not given the opportunity either to see any negative assessment of his work, or to comment on it in the "Annual Interview and Advancement" form before the decision-making process began. The note of 4 May 1992 should have been appended to the decision of 29 June 1992.

Point 22 of circular 26 says that "the first annual interview exercise shall be completed no later than 31 March 1992 and cover a period commencing 1 January 1991". So CERN should have taken account of the appraisals by his first-level supervisor in May and July 1991.

He admits to getting on 6 September 1993 the performance appraisal dated 31 May 1991. But since it is not signed he still has doubts about it and asks the Tribunal to order disclosure of a duly signed text.

E. In its surrejoinder the Organization points out that the complainant worked only six days in March 1992 and an interview therefore proved impossible.

It submits that the complainant was aware of the unfavourable appraisal of his work and that it did respect his right to a hearing.

His other pleas - particularly the one about the disclosure of the memorandum of 31 May 1991 - are groundless.

CONSIDERATIONS:

1. CERN employed the complainant from 1985 under a fixed-term appointment that it extended several times. The Leader of the Personnel Division informed him on 9 July 1991 that it would neither grant him an indefinite appointment nor renew his contract on its expiry on 31 July 1992. He challenged that decision in his first complaint. In Judgment 1184 of 15 July 1992, the Tribunal declared it ultra vires and set it aside and sent his case back to the Organization for review. On 31 July 1992 the Director-General extended his appointment by seven months to 28 February 1993.

2. On 27 August 1992 CERN rejected his request for a further extension. Having failed in an internal appeal, he filed a second complaint. The Tribunal dismissed it in the main in Judgment 1290 of 14 July 1993.

3. This dispute arises out of a decision the Director of Administration notified on 29 June 1993 to refuse him an annual

step increase for 1991-92 on the grounds of poor performance. By a letter of 27 August 1992 he lodged an appeal with the Director-General against the decision. The Joint Advisory Appeals Board submitted recommendations to the Director-General on 8 March 1993. By a letter of 2 April 1993 the Director of Administration told the complainant that the Director-General had decided, in line with those recommendations, to reject his appeal. That is the decision he is impugning.

Authority to take the impugned decision

4. The complainant argues first that the official who signed the decision of 2 April 1993 was acting ultra vires. He is relying in the main on section 2.3 of the annex to the Director-General's memorandum of 17 February 1992 about delegation of authority. Under section 2.3 authority to sign is delegated to the Director of Administration for "All actions subsequent to appeals and mediation" save where the Director himself took the decision contested, in which case it is the Director-General who decides. The decision of 29 June 1992 refusing the annual step increase, against which the complainant appealed to the Director-General, bore the signature of the Director of Administration. In the complainant's submission the Director-General himself must reply; yet it was the Director who signed the letter of 2 April 1993.

5. The want of proper delegation of the right to sign will not necessarily be fatal to a decision. What matters is the actual wording, and it may be necessary to refer to the evidence to determine who really took it.

6. The Director of Administration's letter of 2 April 1993 reads:

> "The Joint Advisory Appeals Board to which your case was referred has submitted its recommendations to the Director-General. I enclose the text. The Director-General has decided to endorse them. On his behalf I hereby inform you that the decision you are challenging is upheld."

Those words bear out CERN's contention that the decision was indeed the Director-General's. It was he who received the Board's recommendations and endorsed them; all the Director did was to tell the complainant on the Director-General's behalf that the decision of 29 June 1992 was being upheld.

7. Besides, the evidence shows that the complainant did not himself regard the confirmatory decision as the Director's. A letter he wrote the Director on 6 April 1993

said: "I have received your registered letter of 2 April 1993 conveying the Director-General's decision to refuse me the annual step increase". And it appears he later held to that view: in his rejoinder, though he argues that the decision was ultra vires, he still refers to mere "notification" by the Director on 2 April 1993.

The merits

8. The Director-General has wide discretion in deciding whether to grant a step increase, especially when his decision rests on appraisal by the staff member's own supervisors. Because of their technical qualifications and familiarity with him and his work they are, after all, best fitted to advise. The Tribunal will nevertheless exercise a limited power of review and will set the decision aside, for example, if it is in breach of a procedural rule or overlooks an essential fact. Such are indeed the flaws that the complainant alleges in the impugned decision and that are, in his view, fatal.

9. His first plea is that the decision is in breach of procedural rules. The nub of his objection is that he was denied the annual interview prescribed in administrative circular 26 of November 1991.

10. Paragraph 5 of the circular says that "once each calendar year, every supervisor shall be required to have a formal interview with each staff member for whom he is responsible" and that "the interviews shall be completed by 31 March at the latest, and be conducted in line with the procedure and using the form provided in Annex I". Although section 1.2 of annex I says in the second paragraph that "the annual interview is held between the official and the direct supervisor", it adds in the third that "the performance of staff unavailable during the period of performance appraisal interviews is appraised during their absence". According to section 1.3 the interviews normally take place between 1 January and 31 March, each division drawing up its own detailed schedule. Section 2.2 requires one week's notice of the interview.

11. It is true that in this instance there was no annual interview. The complainant's supervisors explain that he was on leave until 20 April. The Board observed that he was "at work for only four days in the interview period" but his division "knew how little time there was in which to hold the interview and could have scheduled one".

12. Yet there is no reason to doubt the good faith of CERN's assertion that it could not hold an interview with the required one week's notice. So the complainant's plea about the missing interview fails.

13. He argues that CERN waited until 6 January 1993, when the appeal proceedings had already begun, to tell him what was wrong with his performance and why it was withholding the step. That was when it let him see his group leader's note of 4 May 1992, which, he submits, weighed heavily in taking the decision to withhold the step increase.

14. CERN retorts that it did not need to let him see that note while his performance was being assessed because it related to the decision on the grant of a step increase.

15. The Organization's argument is not convincing. In the second part of the report form the group leader says that he is appending his proposal about grant of a step for 1991-92. So his proposal should have been forwarded at the same time as the form with the decision of 29 June 1992.

16. But the complainant was able to learn what his alleged shortcomings were when he appealed against the Director-General's decision of 29 June 1992. Indeed he admits that during the appeal proceedings he did in fact get the note on which the decision rests. So he may not allege any breach of due process.

17. Nor is there any merit to his plea that essential facts were overlooked. He sees such facts in his group leader's favourable assessment of 20 December 1990, a memorandum of support of 15 July 1991 written by his chief of section and "booster supervisors" and a testimonial dated 30 August 1991 from the deputy group leader. He makes much too of the memorandum of 31 May 1991 from the deputy group leader, which he saw only after making a formal application and on the Joint Advisory Appeals Board's recommendation of 1 July 1993.

18. But none of those items of evidence amounts to an essential fact. They all concern other matters - the procedure for the grant of an indefinite appointment or renewal of his fixed-term one - and relate to a different period, before 9 July 1991, when CERN refused the complainant an indefinite appointment and the renewal of his fixed-term appointment. This dispute is about its refusal of the step increase based on the assessment of his performance in 1991-92.

19. The appraisals by his supervisors, including the one of 4 May 1992 by his group leader, are about his performance since July 1991. Though they are strikingly different from the earlier good reports, the Director-General had discretion to rely on them and on no other text for the purpose of determining whether the step increase was due.

20. There being no need to entertain any of the complainant's other pleas, his claim to the quashing of the impugned decision fails, and so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas Mella Carroll E. Razafindralambo

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-SEVENTH SESSION

In re MUSSNIG

Judgment 1376

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Gabriele Mussnig against the World Health Organization (WHO) on 31 May 1993, the WHO's reply of 18 August, the complainant's rejoinder of 10 November and the Organization's surrejoinder of 10 December 1993;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, WHO Staff Rule 530.2 1040 and 1230, WHO Manual paragraphs II.4.230.2 and 240 and the rules of Procedure of the headquarters Board of Appeal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German citizen born in 1957, joined the staff of the WHO in 1987 as an associate expert at grade P.2. She worked on several programmes under short-term contracts until April 1988. From May 1988 until April 1989 she served as assistant at grade P.3 to a task force on "behavioural and social determinants of fertility regulation".

In May 1989 she began a two-year appointment up to 30 April 1990, also at P.3, as a technical officer with the Global Programme on AIDS (GPA) and was assigned to Luanda, in Angola. In an annual appraisal report her supervisor, the WHO's Representative in that country, described her performance during the first year as "satisfactory".

At the beginning of her second year that supervisor was transferred elsewhere. The WHO's new Representative, Dr. Emmanuel Eben-Moussi, took up duty in June or July 1990.

By a letter of 14 August 1990 the Director of the National Programme on AIDS, at the Angolan Ministry of Health, informed the Director of Public Health that the complainant had notified her intention of taking 30 days' home leave in September as long as the authorities did not object.

On 12 September, in answer to a request from the Director of the National Programme, she reported on financing and the availability of medical supplies.

In a letter of 21 September 1990 the Director of Public Health asked the WHO's Representative to have the complainant recalled alleging that she was incompetent, discourteous and - because "she went on holiday" without permission from the Director of the National Programme - in dereliction of duty.

While she was on home leave in Germany the Director of the National Programme on AIDS alleged in a letter of 2 October to the Director of Public Health that the complainant was to blame for a break in the supply of reagents needed for medical tests and showed a "lack of responsibility and respect". The Director of Public Health appended the letter of 2 October to one dated 3 October in which he asked the WHO's Representative to have the reagents sent from headquarters himself.

She reported back for duty in Luanda on 22 October.

By a telex of 31 October 1990 from headquarters the Chief of the Office of Cooperation with National Programmes of the Global Programme on AIDS asked her supervisor, Dr. Eben-Moussi, to discuss with her the letter of 2 October, seek written comments from her and arrange if necessary for her to come to Geneva for consultations. He did not discuss the charges against her.

She went to Geneva for consultations on 17 November and learned there of the charges in the letter of 2 October. In a report of 26 November to the Director of GPA she denied them. The Administration referred her report to an ad hoc commission.

In a telex of 25 January 1991 the Chief of the Office of Cooperation with National Programmes under the GPA informed her supervisor that she was returning to Luanda to settle her affairs and asked him to give her "all support during her stay".

Before she left Geneva, in a letter of 28 January 1991 the Chief of Contract Administration in the Division of Personnel gave her three months' notice of termination under Staff Rule 1040 on the grounds of the Angolan Government's "unwillingness to have [her] remain in the position of WHO/GPA Technical Officer"; her appointment would expire at 30 April 1991; and the Organization would try to find another assignment for her.

She entrusted a memorandum of appeal to the Ombudsman of the WHO, asking him to wait for instructions from her before submitting it to the headquarters Board of Appeal.

She was in Luanda from 6 February until 8 April.

On 8 February she asked Dr. Eben-Moussi for the text of a report dated 17 January 1991 which he had sent about her case to headquarters and of which he had sent a copy to the Resident Representative of the United Nations Development Programme (UNDP); he refused on the grounds that he owed her no explanation.

By a telex of 10 February, which she confirmed in another of 6 March, the complainant asked the Ombudsman to file her appeal on her behalf. On 7 March he sent her appeal to the Secretary of the Board of Appeal.

In a letter of 19 March the Secretary asked her to submit "at your earliest convenience the details required" under the Board's Rules of Procedure.

She returned in April 1991 to Geneva, where she looked for work and tried to obtain copies of documents to support her appeal.

In a letter of 10 April 1992 to the Legal Counsel she referred to three refusals from the Administration - between 8 February and 16 July 1991 - to let her see her supervisor's report of 17 January 1991.

In a letter of 26 June 1992 the Legal Counsel informed her that the Director of Personnel was willing to file her supervisor's report of 17 January 1991 in a sealed confidential envelope along with signed statements from the Director of Personnel and the Legal Counsel himself denying the truth of allegations by her supervisor in his report.

On 19 September 1992 she filed a second appeal objecting to the WHO's failure to draw up a "final" appraisal report and claiming disclosure of several items of evidence and reinstatement.

In its report of 12 February 1993 the Board recommended rejecting "Ms Mussnig's appeal" as time-barred. In a letter of 23 March 1993, which she impugns, the Director-General told her that he was endorsing the Board's recommendation but had instructed the Director of Personnel to destroy the document dated 17 January 1991 "purporting to be" an appraisal of her.

B. The complainant argues that her complaint is receivable. Her first appeal, against non-renewal of appointment, mistakenly dated 17 January 1991 but which the Ombudsman filed on her behalf on 7 March 1991, was still pending. The Board never warned her that failure to pursue it might lead to rejection;

nor had she withdrawn it. She filed her second appeal, against the WHO's failure to produce documents in her personal file, within sixty days of receiving the Legal Counsel's letter of 26 June 1992. In any event the Administration's refusal of access to documents in her personal file and its failure to draw up a report appraising her performance in the last year of her employment are in continuing breach of the rules, and so appeal will lie at any time.

On the merits she contends that the non-renewal of her appointment was tainted with prejudice on the part of her supervisor, Dr. Eben-Moussi. That is plain, she says, from his vexatious treatment of her after she had spurned his sexual advances.

She alleges that soon after he had taken up duty at Luanda he invited her into his private quarters after working hours to put through an international telephone call. There he sought sexual favours from her. Having failed, he later began humiliating her in front of others and in private assuming "a humorous and bantering manner". That he was dissatisfied with her "in a distinctly personal sense" was plain from his reminding her "several times" that "there is no way to get through to you".

But his harassment of her did not stop, she says, at "cajolery". In October 1990 he ordered her "not to get in touch with the government services" and denied her access to the AIDS programme office and to "all normal facilities" including the use of official vehicles. When she had finally settled her own affairs and arranged to leave Angola in April 1991 he saw to it that she was stranded with her luggage at the WHO office without means of conveyance. Since it was "too late" to make other arrangements she had to wait another five days to leave.

So damaging was Dr. Eben-Moussi's appraisal of her work that it prompted the Director of Personnel and the Legal Counsel to deny some of his allegations in writing. After the WHO had established that he, and not she, was to blame for the problems that beset the AIDS programme in Angola it had a duty to set the record straight with the authorities. But it failed to do so and left a damaging report in her file for over two years to thwart her search for lasting employment in the WHO or in some other international organisation.

She points out that under WHO Manual paragraph II.4.240 "staff members are entitled to know of, and have access to, any non-privileged material in their Personnel files" and that such material, according to paragraph II.4.230.2, includes "performance appraisal reports ... and any other document related to the staff member's performance and conduct". By

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She points out that under WHO Manual paragraph II.4.240 "staff members are entitled to know of, and have access to, any non-privileged material in their Personnel files" and that such material, according to paragraph II.4.230.2, includes "performance appraisal reports ... and any other document related to the staff member's performance and conduct". By failing to let her see her supervisor's comments on her performance the Administration was in breach of the rules.

She alleges breach of Staff Rule 530.2, which provides for evaluation of a staff member's work at least once a year for officials at grade D.2 and below. The Organization's failure to report on her work in her last year in its employ is a fatal flaw.

She claims the production of various documents. She seeks reinstatement on a suitable post with payment of salary and other benefits from the date of termination and awards of material and moral damages and of 6,000 Swiss francs in costs.

C. In its reply the WHO submits that her complaint is irreceivable. Although her first appeal was timely, she failed to supply the further details the Secretary of the Appeal Board had asked for. Her second appeal, of 19 September 1992, in which she applied for the production of documents, and indeed her claim to an appraisal report, were just an attempt to reopen "the expired time limits". She ought to have made that application and that claim part of her original appeal. She allowed her appeal to lapse.

The WHO is disclosing all but two of the documents she wants: of the two one has been destroyed and the other - if it exists - is about another official and disclosing it would be improper.

On the merits the Organization explains its preoccupation with keeping some documents secret: by not disclosing adverse comments on her performance from her supervisor and the Angolan authorities it sought to deprive them of legal effect. No doubt it should have made its views plain at the time of non-renewal; but it believed that to fulfil its obligations towards her it need only give her such temporary appointments as it could offer and help her to find work elsewhere. Any "inconsistency" or "lack of coordination" in its handling of her case sprang from the problems that beset the AIDS project in Angola.

If her complaint were declared receivable, her case should, since the Board of Appeal did not go into the merits, be sent back for the purpose. As for her claim to reinstatement, such relief in the present financial climate would not be advisable. The WHO does not have "strong views" as to whether it would now serve any purpose to write an appraisal report for 1990-91.

D. In her rejoinder the complainant observes that the WHO does not dispute any of the facts she set out, among them her supervisor's unfair treatment of her and the injury it caused her.

As to receivability she observes that her original appeal was filed on 7 March 1991, within sixty days of notice of non-renewal. It clearly identified the decision she was challenging; she never withdrew her claim to the quashing of the decision despite suggestions from senior officials in the Personnel Division that her appeal might harm her prospects of re-employment; and the WHO is wrong to treat the appeal as having been filed in September 1992. It is disingenuous to contend that she should have filed her claim about the performance appraisal with the first appeal: at that time the material period had not lapsed; she did not have written notice of the WHO's refusal to give her a report; and she had yet to exhaust the administrative means of redress.

On the merits she submits that by denying her access to documents which other officials had seen the Administration infringed her right to defend her case. What is more, its silence about charges it considered unfounded made the injury to her feelings and reputation the greater.

She presses her claims and seeks the production of further documents. It would not, she submits, be proper to remit her case to the WHO: since the Organization does not dispute the facts of her case referral to the Board of Appeal would only cause delay.

E. In its surrejoinder the WHO, while acknowledging that she lodged her first appeal in March 1991, maintains that her complaint is time-barred. She had only herself to blame for lack of diligence in prosecuting that appeal. Inasmuch as the documents she now wants form part of a selection process, which must remain secret, the WHO refuses to produce them.

CONSIDERATIONS:

1. The complainant entered the service of the World Health Organization in January 1987 at grade P.2. After serving under short-term contracts she was employed as from May 1989 as a technical officer at grade P.3 under the Organization's Global Programme on AIDS (GPA) and assigned to Luanda, in Angola.

2. The complainant's duties as technical officer included "planning, implementing and co-ordinating activities"

in support of the national AIDS control programme and financial management of that programme in co-ordination with the Government of Angola. The WHO's team in Luanda consisted of its Representative in Angola, the technical officer and an epidemiologist. Although Luanda was a difficult duty station the complainant seems to have worked well with those who were involved in the National Programme. Indeed in her performance appraisal report for the period from May 1989 to April 1990 her first-level supervisor, the then Representative, affirmed on 23 March 1990 that she had adjusted "successfully" to expatriation and her second-level supervisor, the Chief of National Programme Support under GPA wrote on 19 April that her "performances have been satisfactory, particularly when the circumstances under which she had to work and start a new programme are considered".

3. Relations in the office soured, however, with the arrival in Luanda in June or July 1990 of a new Representative, Dr. Emmanuel Eben-Moussi. The complainant has indeed made serious allegations against Dr. Eben-Moussi of sexual harassment and victimisation. Those allegations are summed up in B above.

4. By a memorandum of 22 January 1991 to the Chief of Contract Administration (ADM/PER) at headquarters the Chief of Administrative Support Services of GPA started action to terminate the complainant's appointment on the grounds that the Angolan Government officials had informed the Organization through its Representative of their unwillingness to have the complainant stay on as technical officer. While the complainant was on a visit to Geneva for consultations the Chief of ADM/PER gave her, by a letter dated 28 January 1991, notice under Staff Rule 1040 that because of the Government's position her contract would not be renewed but would end on its expiry, at 30 April 1991.

5. She sought help from the WHO's Ombudsman, gave him a memorandum appealing against the non-renewal of her contract and asked him not to forward it to the Secretary of the headquarters Board of Appeal until she told him to do so. She went back to Luanda. From there she sent telexes on 10 February and 6 March to the Ombudsman telling him to file the appeal. He did so on 7 March. The Secretary of the headquarters Board wrote her a letter on 19 March enclosing the Board's Rules of Procedure and requiring her to submit as soon as she could "the details required".

6. The complainant went back to Geneva in April 1991 and was then employed under two further short-term contracts with the Organization and under two more with other United Nations agencies.

7. Staff Rule 1230.8.3 reads:

> "A staff member wishing to appeal against a final action must dispatch to the Board concerned, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

8. In her appeal, which was sent on 7 and received on 8 March 1991, the complainant gave notice of appeal against the decision not to renew her appointment. She alleged material, moral and professional injury from the treatment of her at the WHO's office in Luanda. She accused the Representative of "heavy involvement in what looks on the surface as Government decision", namely that she should not be kept on as technical officer after the expiry of her contract on 30 April 1991. She wanted certain statements by WHO officials to be put into writing.

9. On 19 September 1992 she lodged a second appeal against the Organization's refusal on the ground of privilege to release to her certain texts in its possession and against its failure to make a performance appraisal report for the period 1990-91.

10. The Board met on 5 February 1993. After taking oral submissions - which it restricted to a duration of five minutes - from the complainant's representative it concluded in a report dated 12 February 1993 that neither of her appeals complied with its Rules of Procedure. It did not specify what provisions of its Rules had not been observed or why such infringement prevented it from hearing her appeals on the merits; but it declared the appeals time-barred and recommended rejecting them as irreceivable. The Director-General accepted the Board's recommendations and so informed the complainant by a letter of 23 March 1993. That is the decision she is impugning.

Receivability

11. Article VII(1) of the Tribunal's Statute declares that "a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him in the applicable Staff Regulations". The headquarters Board and the Director-General rejected the complainant's appeals as time-barred and therefore irreceivable. If that view is right

the complaint will be irreceivable under VII(1) because the complainant has failed to follow the internal appeal procedure properly.

12. The WHO pleads that "taking the date of 8 March as the starting point, the formal appeal to the Board was not lodged until 19 September 1992, that is to say eighteen months after the date on which she was asked to correct the original submission".

13. That plea is beside the point. The complainant's first appeal was lodged on 7 March 1991. What it appealed against was the decision of 28 January 1991 not to renew her appointment. It consisted of a detailed brief which contained all the information that the Board of Appeal needed to enable it to report on the appeal. What she lodged on 19 September 1992 was her second appeal, which was aimed at obtaining texts the Organization had refused to produce. As for the letter of 19 March 1991 from the Secretary of the Board, it simply told her to supply "the details required"; it did not specify which further details the Board required and the absence of which would prevent it from making recommendations to the Director-General. According to the case law - see for example Judgment 607 (in re Verron) under 8 - though the rules on internal appeals must be respected because proper administration so requires, "they are not supposed to be a trap or a means of catching out a staff member who acts in good faith". As for the Board's Rules of Procedure, their purpose is to promote the expeditious and orderly hearing of appeals, not to deprive appellants of any right of appeal conferred on them by the Staff Rules.

14. In accordance with Rule 1230.8.3 the complainant's first appeal was lodged "within sixty calendar days". Her second appeal, lodged on 19 September 1992, challenged the Organization's decision of 26 June 1992; because of her absence from Geneva, which the Organization does not deny, that decision came to her notice on 1 August 1992; so again she observed the sixty-day time limit. Both appeals were therefore properly before the Board. The conclusion is that the complainant has exhausted the internal means of redress even though the Board failed to go into the merits. Her complaint is therefore receivable.

The merits

15. The Organization has asked that if its objections to receivability are not upheld the Tribunal send the case back to the headquarters Board of Appeal. The Tribunal will not do so. The Board has already had the opportunity to go into the merits but declined to do so, and there is no call to afford it

the opportunity again. The Tribunal is able to rule on the merits and will do so.

16. The Organization does not contest the complainant's account of the facts on which she founds her case. In particular it does not seek to refute her allegations against Dr. Eben-Moussi. It might, for example, have submitted a written denial by him if he had made one; but it has not done so. What emerges from the evidence is a campaign of victimisation of the complainant by the WHO's Representative after she had rejected his sexual advances. He sent headquarters a highly adverse report dated 17 January 1991 about her which both he and the Organization refused to show her. By a letter of 26 June 1992 the Organization's Legal Counsel informed her that he and the Director of Personnel had signed statements refuting the Representative's allegations. The WHO itself admits that it should have formally stated that it regarded as "without foundation" the Angolan Government's allegations against her of unsatisfactory performance and that that view should have been communicated to all the parties concerned.

17. The WHO eventually decided, on 23 March 1993, to destroy the Representative's report of 17 January 1991 on the grounds that it did not comply with the rules on the appraisal of performance. Only then was the complainant given a copy of the report. According to her, however, it was already known to officials whose support was indispensable if she was to be offered further employment.

18. In point of fact she did have difficulty in getting employment because of the false impressions that had been given about her performance in Luanda. Of the examples of such difficulty that she cites one is that the Chief of the WHO's Office of International Co-operation "contacted the Division of Personnel concerning the complainant", but went no further on receiving "written information [from the Chief of Contract Administration] which referred to difficulties encountered in Angola". The other example she gives is that she was interviewed in December 1991 for a post as consultant on a project financed by the WHO with the International Trade Centre in Geneva but someone else was appointed.

19. Be that as it may, in the two years preceding the filing of the complaint the complainant was able to obtain only short-term employment for a total of less than six months. The upshot is that her career is in ruins and, at least on the evidence before the Tribunal, the official who is the cause of her troubles has been left unscathed. Any organisation that is serious about deterring sexual harassment and consequential abuse of authority by a superior officer must be seen to take proper action. In particular victims of such behaviour must

feel confident that it will take their allegations seriously and not let them be victimised on that account. In this case the WHO has utterly failed to protect the complainant's rights.

20. The damage caused to the complainant's career and reputation is so grave that no form of redress short of reinstatement and the grant of a further contract of employment will suffice.

(1) She must be put in the same position as if her contract had never terminated and be reinstated as from the date of termination and up to the date of this judgment. Her salary, allowances and any other benefits are to be reckoned at the rates applicable at WHO headquarters in Geneva. The assumption is that since her performance was without reproach it would have continued to be so; she is therefore further entitled to any annual within-grade step increments she would ordinarily have been granted. Any indemnities or occupational earnings she may have received since termination may be deducted from the amounts due, but she is entitled to payment of interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due.

(2) She must be granted a contract of employment for a period of two years from the date of this judgment at the appropriate grade and step and in a post matching her qualifications and experience.

(3) She is entitled to an award of damages for the moral injury she has suffered, and the amount is set at 25,000 Swiss francs.

(4) She is also entitled to 6,000 Swiss francs in costs, the amount she claims.

21. Since she has succeeded in her main claims there is no need to entertain her claim to the production of further evidence.

22. Lastly, she claims the establishment of a performance appraisal report for the period from May 1990 to April 1991. The Organization says that it "does not have strong views on the matter of the appraisal and would reinitiate the necessary procedures for the establishment of a report, should the Tribunal so order". The Tribunal will so order.

DECISION:

For the above reasons,

1. The Director-General's decision of 23 March 1993 is quashed.
2. The Organization shall reinstate the complainant, as provided in 20(1) above, as from the date of termination of her appointment.
3. It shall grant her a contract of employment for two years, as provided in 20(2) above, from the date of this judgment.
4. It shall establish a report appraising her performance from May 1990 to April 1991.
5. It shall pay her 25,000 Swiss francs in moral damages.
6. It shall pay her 6,000 Swiss francs in costs.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

Wm Douglas
William Douglas

Mella Carroll
Mella Carroll

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SEVENTH SESSION

In re KIGARABA (No. 4)

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Richard Kigaraba against the Universal Postal Union (UPU) on 21 January 1994 and the UPU's reply of 31 March 1994;

Considering that by a letter of 11 April 1994 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 28 April 1994 the Union informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

William Douglas Mella Carroll Michel Gentot

A.B. Gardner

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